SUPREME COURT OF THE UNITED STATES.

No. 148.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, PLAINTIFF IN ERROR,

vs.

JOHN W. TOBIN AND MARY TOBIN.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Caption	1	1
Declaration	1	2
Summons	4	3
Pleas	6	3
Order on pleas	7	4
Plea in abatement	8	4
Charter of the city of Vicksburg	10	5
Demurrer	44	24
Order on demurrer	46	25
Pleas	45	25
Pleas	47	26
Demurrer	49	27
Order on demurrer	49	27
Statement of facts	50	27
Verdict and judgment	52	29
Agreement of counsel	59	32
Petition for writ of error	60	32
Order granting writ of error	60	33
Bond	61	33
Citation	64	34

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between John W. Tobin & Mary Tobin, and the mayor & aldermen of the city of Vicksburg, a manifest error hath happened, to the great damage of the said mayor & aldermen of the city of Vicksburg, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 8th day of October, A. D. 1877, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-six.

Witness also George T. Swann, clerk of said circuit court, and the seal of said circuit court hereto affixed, this fifteenth day of January, in the year of our Lord one thousand eight hundred & seventy-seven.

[SEAL.] GEO. T. SWANN,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

(Indorsed:) No. 2231. Mayor & aldermen of Vicksburg vs. Jno. W. & Mary Tobin. Order supersedeas. Filed Jan'y 15th, 1877, and copy to marshal. G. T. Swann, cl'k. Nugent & McWillie, atty.

1 Pleas and proceedings had and done in the circuit court of the United States for the southern district of Mississippi, at a regular term thereof, begun and held at the court room in the city of Jackson on the 1st Monday, being the 6th day, of November, A. D. 1876, before the honorable Rob't A. Hill, district judge, present and presiding.

MARY TOBIN AND JOHN W. TOBIN, HER husband,
vs.
THE MAYOR AND ALDERMAN OF THE CITY of Vicksburg. } 2231.

Be it remembered, that heretofore, to wit, on the 21st day of July, A. D. 1875, Mary Tobin and John W. Tobin, her husband, by their attorneys, Messrs. Pittman & Pittman, filed in the clerk's office of said court their certain declaration against the mayor and alderman of the city of Vicksburg, which, with the endorsement thereon, is in the words & figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi. To November term.

MARY TOBIN AND JOHN W. TOBIN, HER husband,
vs.
THE MAYOR AND ALDERMAN OF THE CITY of Vicksburg.

Mary Tobin and John W. Tobin, who are residents of the city of New Orleans, and citizens of the State of Louisiana, complain of the Mayor and alderman of the city of Vicksburg, a municipal corporation under and by virtue of the laws of the State of Mississippi, situated in
2 the county of Warren and State aforesaid, of a plea of trespass on the case on promises, in right of said plaintiff Mary Tobin, for that whereas the said defendant on, to wit, the first day of June, A. D. 1875, was indebted to the said plaintiff Mary Tobin in the sum of six thousand two hundred and thirty dollars, for so much money by the said defendant before that time had and received to and for the use of the said plaintiff, and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook and then and there faithfully promised the said plaintiff to pay her the said sum of money, when the said defendant should be thereunto afterwards requested. Yet said defendant hath disregarded its said promises and hath not paid any of said moneys, or any part thereof, to the plaintiffs' damage of six thousand two hundred and thirty dollars, and therefore they bring suit.

2d. And whereas also the said defendant, to wit, on the 1st day of June, A. D. 1875, was indebted to the said plaintiff in the further sum of six thousand two hundred and thirty dollars for divers sums of money before that time exacted from plaintiff by the defendant, by compulsion and duress, as wharfage for steamers Pargoud and Ouachita Belle, the Katie, and other vessels of the plaintiff regularly licensed and enrolled as American vessels employed in the navigation of the Mississippi River and its tributaries in the carrying of freight and passengers,
3 under and by virtue of a pretended ordinance of said city, whereby it was ordained that all steamboats landing at said city shall pay wharfage according to the following rates: "All packets terminating their trips at this city, per week, $10. All steamboats passing and repassing, for each landing, as follows: All steamboats under 1,000 tons, $10; each steamer exceeding 1,000 tons, at the rate of $1 per 100 tons in excess; and whereby it was further ordained, that if the captain or officer in command of any boat or water-craft shall refuse to comply with the provisions of this ordinance, on conviction thereof before the mayor of said city, the captain or officer in command of such steamboat or water-craft shall be liable for and pay the sum of $50.00 with costs of suit, and said boat shall be charged at the rate of $100 for each landing thereafter until the settlement of the legitimate claim;" which said pretended ordinance, as plaintiff is advised, was and is in contravention of the provisions of the Constitution of the United States, and illegal and void; and which said divers sums of money, so exacted as aforesaid, were paid by plaintiff at divers times when her said vessels had landed at said port, upon the demand of the defendant through its officers, to avoid the seizure of plaintiff's said vessels, and the other fines and penalties set forth in said pretended ordinance, amounting in the aggregate to the sum of six thousand two hundred and thirty dollars, and be-

4 ing so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook and then and there faithfully promised the said plaintiff to pay her the said sum of money when the said defendant should be thereunto afterwards requested. Yet, said defendant hath disregarded its said promises, and hath not paid any of said moneys or any part thereof, to the plaintiffs' damage of six thousand two hundred and thirty dollars, and therefore they bring this suit and demands judgment for said several sums of money, together with the interest thereon.

PITTMAN & PITTMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed July 21, 1875. Geo. T. Swann, clerk.

And on the day and date of the filing of said declaration, a summons issued from the clerk's office of said court, which, with the return of the marshal thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you that, without delay, you summon the mayor and alderman of the city of Vicksburg, a municipal corporation under
5 the laws of the State of Mississippi, situate in the county of Warren and State aforesaid, defendants, that they be and appear at the circuit court of the United States, to be held at the court-room thereof, in the city of Jackson, in and for the southern district of Mississippi, on the first Monday of November next, to answer to Mary Tobin and John W. Tobin, who are residents of the city of New Orleans, and who are citizens of the State of Louisiana, of a plea of trespass on the case on promises, founded on a claim of $4,230.00, for so much money exacted of plaintiffs by the defendants illegally, for alleged wharfage-dues, and paid to defendants by plaintiffs, according to bill filed with declaration, to plaintiffs' damage five thousand two hundred and thirty dollars, and that they do file their plea or defense in said court on or before the said meeting thereof, or judgment will be given against them by default; and have you then there this writ, and how you have executed the same.

Issued under my hand, with the seal of said court hereto affixed, at Jackson, in said district, this 21 day of July, A. D. 1875.

[SEAL.] GEO. T. SWANN, *Clerk.*

(Endorsed:) Due and legal service of the within summons is hereby accepted this 28 day of July, A. D. 1875.

R. O'LEARY, *Mayor.*

6 And afterwards, to wit, on the 6th day of November, A. D. 1875, the following pleas were filed in the clerk's office of said court, in words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi. November term, A. D. 1875.

MARY TOBIN AND JOHN W. TOBIN, HER HUSband,
vs.
THE MAYOR AND ALDERMAN OF THE CITY OF Vicksburg.

1st. And comes the defendants, by their attorney, and defends the

wrong, injury, &c., and for plea in this behalf say that they were not indebted to plaintiffs for money had and received, as charged in plaintiffs' said declaration, for defendants' use.

2d. And defendants further say they did not undertake and promise in manner and form as stated in plaintiff's declaration.

3d. And for further plea in this behalf, defendants deny each and every allegation in plaintiffs' declaration contained, and put themselves upon the country.

4th. Defendants further say that the ordinance of the city of Vicksburg, referred to in plaintiffs' declaration, has never been enforced against plaintiff in manner and form as charged, or any other person, and that no distinction has been made between plaintiffs' boats and other boats on account of tonnage, and of this they put themselves upon the country.

7 5. And for further plea defendants say that they are the owners in their corporate capacity of the landing in front of the city of Vicksburg, where plaintiffs' said boats landed when said charges were made, and as such owners were entitled to charge for the use and occupation of said landing, and of this they put themselves upon the country.

WARREN COWAN,
Attorney for Defendants.

(Endorsed:) Filed Nov. 6, 1875. Geo. T. Swann, clerk.

And afterwards, to wit, on the 2d day of June, A. D. 1876, being a day in the May term, A. D. 1876, of said court, an order was made in said cause, which is in the words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi. May term, A. D. 1876. June 2d, A. D. 1876.

JOHN TOBIN AND MARY TOBIN ET AL.
vs.
THE MAYOR AND ALDERMAN OF THE CITY OF Vicksburg. } 2231.

It is ordered by the court that Warren Cowan, attorney for defendants in this cause, be allowed to withdraw the pleas heretofore filed herein, and that his plea in abatement be filed. Ordered this the

8 2d day of June, 1876.

R. A. HILL,
Judge.

And on the day and date last above mentioned, to wit, the 2d day of June, A. D. 1876, being a day in said term aforesaid of said court, a plea in abatement, together with a copy of the charter of the city of Vicksburg, were filed in said cause, which, with the endorsements thereon, are in the words and figures following, to wit:

Circuit court of the United States for the southern district of Mississippi. To May term, A. D. 1876.

MARY TOBIN ET AL.
vs.
MAYOR AND ALDERMAN OF THE CITY OF Vicksburg.

And the said defendants, by leave of court first had and obtained, say

that the plaintiffs ought not further have and maintain their aforesaid action against these defendants, because they say that since the last continuance in this cause, to wit, on the 7th day of April, 1876, the legislature of the State enacted a law, which was then approved by the governor of said State, entitled "An act to constitute the inhabitants of the city of Vicksburg a body politic and corporate, and to define the boundaries of said city," here to the court shown, which said act materially alters and lessens the area of the said former city of Vicksburg, and by the forty-second section of which it is enacted that said
9 act shall supersede all charters and laws for the government of the city of Vicksburg which may be in existence upon its passage, and that all laws and parts of laws in conflict with said act are hereby repealed, and that said act take effect and be in force from and after its passage; and by the fortieth section thereof it is enacted that the officers of the corporation of said city in office on the said 7th April, 1876, shall continue in office under existing laws until the first Tuesday in September, 1876, and the present mayor and alderman of said city shall provide for holding the first election according to the provisions of said act of April 7, 1876; and these defendants say that the charter of said city of Vicksburg under which the debts in the declaration mentioned were contracted has been abrogated, repealed, and annulled; that the said former corporation of Vicksburg has been dissolved by law, and that these defendants are no longer the mayor and alderman of the city of Vicksburg as in said declaration mentioned, and can no longer sue and be sued, but that they are only kept and retained in office under and by virtue of the said act of April 7th, 1876, for the purpose of organizing the new city government under said last-mentioned act, and for no other purpose whatever; and these defendants are ready to verify; wherefore they pray the judgment of this court whether the said plaintiffs should further have and maintain their aforesaid suit, and that the same abate.

WARREN COWAN,
Attorney for Plea.

(Endorsed:) Filed June 2, 1876. Geo. T. Swann, clerk.

10 An act to constitute the inhabitants of the city of Vicksburg a body politic and corporate, and to define the boundaries of said city.

Boundary lines of the city.

SECTION 1st. Be it enacted by the legislature of the State of Mississippi, That the limits and boundaries of the city of Vicksburg shall hereafter be as follows, to wit: commencing at a point in the center of the mouth of Glass Bayou as defined on James M. Searle's survey of said city; running thence south down the middle of the river to a point in said river, where a line drawn east to the shore would join in with the southern boundary of Klein street to the intersection of Pearl street extended; thence south along the west side of Pearl street to the intersection of the city limits as established by the charter of said city, approved April twelfth (12); thence east along the southern boundary line of said city as laid down on James M. Searle's map of said city to the point where said line intersects the bayou in section thirty-four (34), near and just east of the Hall's Ferry road; thence nearly north along the said bayou to where said

bayou is intersected by Bay street; thence along the south side of Bay street to the intersection of Court street; thence north along the east side of Court street; thence eastward along the south side of Elm street to a point where Elm street intersects the western line of lot No. eight (8) in section twenty-one (21), being the lot laid down on James M. Searle's map of said city as the Baum Place; thence eastward in a straight line to the intersection of Baldwin Ferry road to the intersection of Howard street, extending
11 thence north along the east side of Howard street extended to the intersection of the Vicksburg and Meridian Railroad; thence eastward along said railroad to the limits of said city as defined by the charter, approved April twelfth (12), 1873; thence northward along the eastern limits of said city as defined by said charter to the intersection of Main street; thence west along the north side of Main street to the intersection of Third North street; thence along the east side of Third North street to a point where the eastern line of said street prolonged will connect with the eastern line of Ash street; thence along the east side of Ash street extended to Catherine street; thence west along the north side of Catherine street to a point where it intersects with Glass Bayou; thence down or westward along Glass Bayou to the place of beginning, and shall be laid off in four wards, as follows:

Bound'ry lines of 1st ward.

The first ward shall embrace all the territory in said city bounded as follows: Beginning at a point on the Mississippi River where Clay street prolonged would strike said river; thence along Clay street to its intersection with Cherry street; thence along Cherry street to the northern boundary of said city.

Of 2d ward.

The second ward as follows: Beginning at a point on the eastern boundary line of the city where Clay street prolonged would strike said line; thence along Clay street to its intersection with Cherry street; thence along Cherry street prolonged to the northern boundary of the city.

Of 3d ward.

The third ward as follows: Beginning at a point on the Mississippi River where Clay street prolonged strikes
12 said river; thence along said street to its intersection with Walnut street; thence in a line along Walnut street prolonged to the southern boundary line of the city.

Of 4th ward.

The fourth ward as follows: Beginning at a point on the eastern boundary of the city, where Clay street prolonged would strike said line; thence along Clay to its intersection with Walnut street, to the southern boundary of the city.

Inhabitants constituted a body politic.

SEC. 2. Be it further enacted, That the inhabitants of said city are hereby constituted a body politic and corporate with perpetual succession by the name and style of the "Mayor and Aldermen of the City of Vicksburg," and as such,

Name.

by that name, shall be capable of contracting and being contracted with, suing and being sued, pleading and being impleaded, answering and being answered unto in all courts and places and in all matters whatsoever, and may acquire, by purchase or otherwise, for corporation purposes, per-

sonal, real, or mixed property, and may have and use a common seal, and change and renew the same at pleasure.

SEC. 3. Be it further enacted, That the qualified voters of the State residing in the city one month prior to any election shall be entitled to vote in the wards in which they may have each respectively resided fifteen days at the time of the election. Such elections shall be by ballot, and elections or appointments by the board of aldermen hereinafter provided will be made by each member reading or declaring his ballot to the presiding officer of the board.

SEC. 4. Be it further enacted, That a general election to fill all municipal offices made elective by the
13 people shall be held on the first Tuesday in June, 1876, and biennially thereafter on that day, between the hours and in the manner prescribed by the law for State elections. The newly elected officers shall qualify and enter upon the duties of their respective offices on the first Tuesday of September succeeding their election, and continue in the discharge thereof until their successors are elected and qualified.

SEC. 5. Be it further enacted, That preceding each municipal election the board of mayor and alderman shall provide convenient and suitable voting places, ballot-boxes, and means for holding the election in each ward, and the mayor shall give notice, by publication in one newspaper of general circulation in the city, and by posting the same at the courthouse, mayor's office, and at the place of voting, and one other public place in each ward where such election is to be held, twenty days prior to the time of holding such election. The mayor shall nominate to the board of alderman for their confirmation six persons in each ward where the election shall be held, being qualified voters of the ward & not candidates for any offices to be voted for at the election, three of whom shall be named as judges of the election to be held in the ward of their appointment, and the other three as alternates to fill any vacancy that may from any cause occur in the board of judges, one of whom shall act as clerk of the election. The said judges, before entering upon
14 the discharge of their duties, shall take and subscribe to the oath in writing before the mayor, city clerk, or some justice of the peace, to faithfully discharge their duties as judges of the election and make true return thereof to the board of mayor and aldermen, which oath shall be filed by the city clerk, to be retained by him as a part of the records of the corporation.

Counting the votes.

It shall be the duty of the judges to enter upon the count of the votes cast at their respective places for voting the same evening the polls are closed, and complete said counting at an hour not later than 12 o'clock m. of the day succeeding the election. As soon as the count is completed, the judges shall recapitulate the result of the vote for each candidate and endorse the same with the following certificate: "We, the undersigned, judges of the election held in ward on the day of , A. D. 18 , do hereby certify that the accompanying statement shows correctly the result of said election in said ward." Said certified rati-

Certificates.

fication, attached to the tally-sheet upon which the count is kept, shall be deposited in the ballot-box, which, properly sealed down, shall be delivered from the custody of the judges to the city clerk, *are* retained by him so sealed until he shall open them under their direction & in the presence of the board of mayor and alderman. The board of mayor and alderman shall assemble not later than the third day after the election is held, and by an order to be spread upon the minutes of the board, declare upon the return of the judges the candidates receiving the highest number of votes for their respective offices. And thereupon the mayor shall be required to issue to the officers elected, upon their demand, certificates of their election, and the officers holding said certificates shall be entitled to assume, at the proper time, the offices to which they are certified as having been elected.

Exclusive judges to determine who is elected, failure to elect.

SEC. 6. Be it further enacted, That the board of mayor and alderman shall be the exclusive judges of qualification and election of the aldermen, and if at any general election for city offices there shall occur a failure to hold the election in any one ward (and the board of mayor and alderman, at their meeting to be held as provided in preceding section, shall be judges of the fact, and declare upon the minutes of the board their judgment of any such failure), the result of the election as to such general offices shall not be affected thereby; but upon such a failure in any two or more wards, the board of mayor and alderman shall direct a new election to be held within a period not later than thirty days for general city officers, and also for alderman of said wards in which elections were failed to be held; they shall also direct the holding of special elections to fill vacancies that may occur in elective offices of the city in manner provided for holding the regular elections.

Shall provide for filling vacancies.

Who are the corporate officers of the city.

SEC. 7. Be it further enacted, That the corporate officers of the city shall consist of two aldermen from each ward, one mayor, one assessor, and collecter of taxes; one city clerk, one city marshal, one wharf and harbor master, one market master, one city registar, one city physician, one city sexton. The mayor, members of the board of alderman, city marshal, city physician, assessor, and collecter and wharf and harbor master shall be elected by the qualified voters of the city. The market master, city sexton, and city registrar shall be appointed by the mayor and alderman, and shall hold their offices for the period of two years, subject to the power of removal by the board of mayor and alderman, as hereafter provided. Each newly elected board of mayor and alderman shall meet in executive session on a day to fixed by them not later than the fourth day after the beginning of their term of office and proceed to choose, by ballot, incumbents of offices hereby made appointive by them. A concurrence of a majority of the executive board shall be required to a choice. Their action in this behalf shall be spread upon the minutes of the board, and shall constitute the authority of the persons chosen to qualify and enter upon the duties of their respective offices.

Officers chosen by board.

Mode of choosing.

SEC. 8. Be it further enacted, That all city officers at the date of their election or appointment shall be legal voters of the city and have resided therein at least two years next proceding their appointment or election, and the members of the board of aldermen shall reside in the respective wards from which they are chosen. Change from the residence of the ward they may have been chosen to represent shall ipso facto make vacant their office as alderman. Qualification for office.

17

SEC. 9. Be it further enacted, That any city officer, whether elected or appointed, before entering upon the duties of his office, shall take and subscribe the following oath in writing before the circuit or chancery clerk in Warren County: "I, do solemnly swear that I will to the best of my abi'ty, faithfully and impartially discharge the duties of the office of , and while filling the same will not become individually interested, either directly or indirectly, in the profits or proceeds of any contract to which the corporation of the city of Vicksburg is a party, so help me God." And in addition thereto, the following officers shall execute a bond with two or more good and sufficient freeholder sureties to be approved by the board of mayor & aldermen, to be fixed by them not less than as follows: mayor, twenty-five thousand dollars ($25,000); assessor and collector, twenty-five thousand dollars (25,000); city marshal, five thousand (5,000); city clerk, three thousand (3,000); wharf and harbor master, five thousand dollars (5,000); market master, one thousand (1,000); and the mayor as ex officio treasurer shall execute a like bond in such penalty as may be fixed from time to time by the board of aldermen. The bond of each officer shall be made payable to the board of mayor and alderman of the city of Vicksburg, and conditioned for the faithful and impartial discharge of the duties of the office as prescribed by law, and the prompt paying and disburs'ment and accounting for as required by law of all money received by him officially, and the delivery to his successor in office of all city property whatsoever that may have come to his hands or control by virtue of his office; said bonds, when executed and approved, with the affidavit hereinbefore required annexed, shall be placed on file in the office of the city clerk subject to the order of the board of mayor and alderman. Any official bond may be put in suit in the name of the corporation, and recovery had to the use of the person aggrieved by a breach thereof, the cost of all such to be borne by the usee of the suit or party cast in the suit. Oath of office. Bonds of city officers. Conditions.

18

SEC. 10. Be it further enacted, That the mayor shall preside as chairman at the meetings of the aldermen; he shall be the chief executive officer of the corporation and ex officio treasurer of the city; it shall be his duty to see the laws and ordinances of the city strictly enforced; to inspect the conduct of all subordinate officers of the corporation, and see that their duties are performed, and to report from time to time in writing to the board of alderman all neglect of duty on the part of such officers, and give such information Duties of the mayor.

and recommend such measures as he may deem beneficial to the health, security, and good government of the city; he shall have a vote with the aldermen in the appointment by the board of city officers, but in no other instance save where there is a tie vote of the alderman; he shall then have the casting vote; he shall have the power to veto any ordinance adopted by the alderman; and such vetoed ordinance shall not become a law unless upon a question of its adoption over the veto it shall receive six votes of the aldermen in its favor. Each ordinance shall be submitted by the city clerk to the mayor for his approval or disapproval on the day following its adoption by the alderman; and the mayor, if he shall approve the same, shall sign it approved by him, and the ordinance may become a law as it may provide. If he disapprove the ordinance, he shall within the two days following the expiration of the one which the city clerk shall deliver it to him, return the same to the clerk with his disapproval and reasons therefor, in writing, addressed to the board of alderman. If within forty-eight hours following the expiration of the days upon which an ordinance shall be submitted to him by the clerk, the mayor shall fail to return the same to the clerk with his action thereon in writing, the ordinance shall have the force and effect of a law without action of the mayor. The clerk shall endorse upon such ordinance the time and date of his delivery of the same to the mayor for his action as herein prescribed, and also the time of its return to him by the mayor, and shall lay before the board of mayor and alderman, at their next succeeding meeting, any vetoed ordinance, together with the accompanying communication by the mayor. For his service, the mayor shall receive a salary of not more than twenty-five hundred ($2,500) nor less than two thousand dollars ($2,000), payable quarterly by order of the board of mayor and aldermen.

Right to vote.

Veto.

Mayor's salary.

SEC. 11. Be it further enacted, That the aldermen at the same meeting at which they shall choose the city officers made appointive by them, shall also select by ballot one of their number to be president of the board of aldermen, who shall, in absence or in case of inability upon his part from any cause to discharge the duties of his office, be vested with the power of discharging all the duties of the office of mayor for and during the time of such absence or existence of such inability, but no longer, and during the time of the discharging the duties of mayor, the president of the board shall be allowed, upon the order of the board, pro rata, the same salary as mayor, the sum of such allowance to be deducted from the salary of the latter.

President of the board.

His duties.

SEC. 12. Be it further enacted, That the mayor shall hold a court to be known as the city court, at the city hall, or other convenient locality, by the board of mayor and aldermen; said court shall be considered inconstant session for the transaction of business pertaining to it; the jurisdiction of said court shall extend to all cases arising under the ordinances of the city, and to be concurrent with that of the

Mayor to hold city court.

justice of the peace in criminal only arising within the corporate limits of the city. The city clerk shall be the clerk of the city court, and shall either in person or by his assistant clerk attend its sittings under the direction and authority of the mayor; he shall provide and keep up the ne'ssary dockets and minutes of the proceedings of the court from day to day, and the custody and control of the records theroof. The city marshal shall, if required by the mayor, attend in person or by his deputy upon his court as it' executive officer, and under the direction of the court perserve order during the sitting of the same. The city court have *have* power to fine and imprison in the city prison for contempt of its authority, but in no single instance shall the fine exceed thirty-five dollars of the imprisonment twenty-four hours for such contempt.

Clerk of city court; duties.

The city marshal to attend.

Power in case of contempt.

SEC. 13. Be it further enacted, The the city clerk shall attend the meetings of the board of mayor and aldermen, and keep in a well bound book for the purpose full and correct minutes of the proceedings; he shall be the custodian of the city seal and all files and records pertaining to
21 the affairs of the board, and make due provision for the representation of the same; he shall investigate and report upon the correctness of all accounts, statements or reports of city officers, and all claims and demands again't the city treasurer that may be referred to him by the board. He shall be the clerk of the city court, and under the direction of the mayor keep a docket of all cases adjudicated therein, and a book of minutes of the proceedings of the court from day to day. He shall, whenever required by any party interested, furnish a detailed cost bill of fees due and sought to be collected in any case adjudged in the city court. For his services as city clerk, he shall be allowed an annual salary of not more than eighteen hundred dollars ($1,800), payable monthly out of the city treasury, but none other.

Further duties of city clerk.

Salary.

SEC. 14. Be it further enacted, That whenever any account or claim against the city shall be allowed by the board of mayor and alderman, it shall be the duty of the city clerk to enter in a well-bound book, to kept for that special purpose, styled "Appropriation book," the name of the person to whom the same shall be payable, with the date of the claim, amount and date of allowance. And whenever any contract shall be made by the city with any persons for work to be done, material furnished, or services rendered, the city (other than the usual services prescribed by law for city officials), the city clerk shall enter in well-bound book, to be kept for that purpose, and styled the "Contract book," the names of the contractor, date of the contract, a synopsis of the nature of the contract, the amount contracted by the city to be paid, the sum, the name of sureties of the contractor's bond, if any was required.

Appropriation book.

Contract book.

SEC. 15. Be it further enacted, That all bonds,
22 papers, and records on file, or held in any department of the city government, shall be open for inspection, examination, and procurement of copies by any

Books open for public inspection.

citizen of the corporation, and the officers in charge refusing or obstructing the same, shall be subject to removal from office as provided in the charter; but this section shall not be construed to warrent a dispos'sion of the officer in charge of said book, records, etc., or interfere even with the discharge of his official duties relating thereto.

Warrent book.

SEC. 16. Be it further enacted, That the city clerk shall keep a well bound-book, in which shall be lithographed and prepared suitable warrents in such form as the mayor and alderman may direct, with a duplicate margin to the same, to be by him numbered in regular order; and for every allowance against said city he shall fill up a warrant on the treasurer of said city, in favor of the person intitled to the same, showing upon its face the consideration and the date of the allowance of the account or claim for which the same is issued, and shall deliver the same to the proper person, keeping a marginal duplicate thereof on said warrent book. All warrents shall be signed by city clerk and bear the seal of the city, and said warrants shall be presented to the treasurer of said city, who shall write across the face thereof, if satisfied the same is correct, approved, and shall sign his name thereunder as treasurer, and such warrants so approved shall be paid by check of the city treasurer on the bank of deposit of said city, provided that said bank has funds of said city at the time on deposit; and any failure by said bank to pay said checks when in funds of said city or in preference of any checks by any device or subterfuge, shall be a breach of the condition of the bonds of said bank, and shall entitle the holder of any warrent postponed in the payment thereof to an action on the bond of said bank.

Warrents to be signed by the clerk & treasurer.

Bank of deposit.

Liability.

23

City marshal; his duties & powers.

SEC. 17. Be it further enacted, That the city marshal shall be the chief of the police force of the city, and as such have the regulation and control of the same, subject to the authority and direction of the board of mayor and alderman. The board of mayor and alderman shall appoint, in such manner as they may determine, such number of competent persons to constitute the police force as may be fixed by city ordinance; the policeman so appointed shall receive a compensation of not more than one hundred dollars ($100) per worth out of the city treasury upon allowance by the board of mayor and alderman. The city marshal shall have power of removal of members of the force for inefficiency or disobeying his orders; his power of removal from office shall be subject to such action as the board of mayor and aldermen may adopt upon the petition for redress of the party removed. The city marshal shall see that the orders and judgments of the city court, as they may be directed to him, are promptly executed, and turn over to the city treasury at the expiration of each month all collections of fines imposed, with statement of the names of persons upon fines have been imposed within the month, the date of the judgement, and amount of fines collected; he shall either in person or by his deputy execute all process directed to him by the city court and all lawful orders of the mayor and board of alderman; he may detail from the

Police force salary.

police force one person who shall act as his deputy, and he, with the police force under his authority, shall be conservators of the peace and empowered to make arrests for all violations of ordinances within the city limits. For his services he shall receive such fees in the city court as are by law allowed sheriffs for similar services, and none other.

Conservators of the peace.

Fees of marshal.

SEC. 18. Be it further enacted, That the wharf and harbor master shall faithfully and promptly collect and pay over to the city treasury at the expiration of each week all wharfage and landing dues accruing to the city. He shall keep at one of the wharf boats of the city or other convenient locality a well bound book with proper heading, to be known as the "City landing register," on which he shall enter the name of every steamboat landing at the city wharf, the date of her arrival and departure, her destination and the amount of tax collected from her. He shall also enter therein the character and name or ownership of all other water crafts landing at the city wharf subject to city wharfage dues, together with the date of landing, date of departure, and amount of tax collected, and hold said book subject at all times to inspection by the board of mayor and aldermen. For his services the wharf and harbor master shall receive a commission of ten per cent. upon all his collection', to be allowed by the board of mayor and alderman.

Wharf & harbor master; his duties.

Commissions.

SEC. 19. Be it further enacted, That it shall be the duty of the city registrar to cause to be registered all legally qualified voters of the city applying to him for registration. To this end he shall within thirty days next preceding each general election and for a period of three days in each ward of the city open registration lists, and register in their respective wards all legally qualified voters. He shall issue to each person qualified to vote a certificate of registration containing the of the voter, oath of registration and period of his registry; and to determine the right to registration of any one applying, the registrar shall have power to administer an oath to the applicant that he "will a true answer make to all questions that may be propounded to him touching his qualifications as a voter of the city Vicksburg," and if upon examination under such oath, the registrar shall have good cause to believe the applicant has sworn falsely touching his right to register, his claim to register shall be denied and the registrar shall order him to be arrested upon the charge of perjury, with direction to the officer making the arrest to carry him before any officer qualified to investigate the charge, who shall do with him as the general law directs and provided; in cases of persons charged with perjury, and any person convicted upon said charge before a court of competent jurisdiction shall be punished as by law provided for the crime of perjury. When completed, the registrar shall certify the list of voters registered by him for the several wards to the city clerk, together with a report to the board of mayor and aldermen of the number of the vote's registered by him in each ward. The city clerk shall then cause to be

City registrar; his duties.

Powers.

printed lists of the registered in each ward, with his certificate of their correctness, to be struck off, and supply the *the* same to the judges of all popular elections in said city. The printing of said registration lists shall be done only once in two years. The board of mayor and aldermen shall provide by ordinance the places in each ward at which general and special registration shall be held, and adopt by ordinance such regulations for the same as may not be inconsist*a*nt with this charter. The city registrar shall be allowed the sum of five dollars for each day's service in the duty of registration, and two and a half dollars for an assistant during the said time.

Mayor and aldermen to provide plans for registration.

City registrar; fees, etc.

96

SEC. 20. Be it further enacted, That the city sexton shall have the supervision and control of the city grave-yard, under the direction and orders of the board of mayor and alderm*a*n. He shall bury all paupers at the expense of the city at such places and at such times as be fixed by ordinance of the board, and shall see that all city ordinances for the regulation and preservation of the city grave are carried into effect. He shall receive no salary from the city.

City sexton; duties.

No salary.

SEC. 21. Be it further enacted, That the city market-master shall, under the direction of board of mayor and aldermen, have the supervision and regulation of the city market-house, with authority to maintain order and quiet during market hours by arrest of all disorderly persons. He shall collect all market dues to the city made collectable by him by ordinance, and pay the same over to the city treasurer at the expiration of each month. He shall keep the public market-house in a clean and orderly condition, and for his services shall receive forty dollars a month, payable out of the city treasury on allowance by the board of mayor and alderm*a*n.

Market-master; duties.

Salary.

SEC. 22. Be it further enacted, That the city physician, who shall be a regular graduate of a medical colle*d*ge, shall be the health officer of the city of Vicksburg, and perform all the duties as such; shall be the physician of *of* workhouse, and perform all the duties which may be required of him by the mayor and alderm*a*n for the preservation of the health, and to secure the proper sanitary condition of the city, and shall have full power and authority for this purpose. He shall be required to give bond with good and sufficient sureties in the sum of three thousand dollars ($3,000), conditioned for the faithful performance of his duties, which may be put in suit by the mayor and alderm*a*n or by any one aggrieved, said bond to be approved and recorded as other official bonds. For his services he shall receive a salary to be fixed by the mayor and aldermen not to exceed one hundred ($100) nor less than eighty dollars ($80) per month, to be allowed monthly by said board.

City physician; duties, powers, bond.

27

Salary.

SEC. 23. Be it further enacted, That there shall be two regular meetings of the board of mayor and aldermen in each month—on the first and third Mondays of the month. Five members of the board shall constitute a quorum for business. The mayor or any of the five aldermen shall be empowered

Regular meetings of board.

Quorum.

to call a special meeting of the board at such time as the interest of the city may require, and any regular or special meeting may be adjourned from time to time as may be determined by the board. The mayor shall appoint all regular or special committees of the board; no committee shall be vested with the plenary power over any subject that may be submitted to it, but all matter so referred shall be reported back to the board of mayor and aldermen for final action. The aldermen shall receive five dollars for each regular meeting actually attended, but for no special or adjourned regular meeting, and during their term of office shall be exempt from all jury service.

Special meetings.

Compensation to aldermen.

SEC. 24. Be it further enacted, That it shall be the duty of every city officer to make a monthly report to the board of mayor and aldermen of all money that may have come to his hands by virtue of his office within the month
28 reported for. They shall account to the treasurer and board of mayor and aldermen for the specific money or city paper received by them for city dues. The board of mayor and aldermen by a vote of six aldermen shall be empowered to remove from office any city official for incompetency or neglect to perform the duties of his office, provided a resolution to that effect, specifying the cause of removal, to be introduced by some member of the board to be received and laid over for consideration at the next ensuing regular meeting, at which time the officer sought to be removed shall be heard in his defense. The duties of all officers, whether elected or appointed, not specified by this charter, may be prescribed by ordinance not inconsistent with law. Any willful violation of the oath required of the corporation officers of this charter shall subject the violator to indictment in a court of competent jurisdiction for perjury, and upon conviction, to the pains and penalties of the law for that crime.

Duties of city officers.

Board power to remove.

Officers to be indicted for violation of oath.

SEC. 25. Be it further enacted, That the board of mayor and aldermen are prohibited from making any contract involving any expenditure of corporation funds relating to work on public streets, or the erection, extension or repair of public buildings, where the cost of the proposed work shall exceed five hundred dollars, save in the manner following. Upon the direction of the board the mayor shall advertise for sealed proposals to do the contemplated work for the space of ten days in one newspaper of general circulation published in the city. At the meeting of the board next succeeding the period of publication the mayor shall open and lay before the board any proposals received by him in pursuance of his notice; and the board shall accept the lowest and best bid, or they may reject all the bids offered and direct publication of new notices for other proposals, as they may determine best. No proposals shall be considered unless the same are accompanied by the names of the sureties proposed to be given by the bidder upon his bond for the faithful execution of the contract if awarded him, and in all cases of contract under this provision, bond and security in a sum sufficient to indemnify the city shall be required of the contractor.

Mayor and aldermen not to make contracts for over $500, except in manner prescribed.

Indemnity bonds of contract.

Power to contract exclusively in the board.

SEC. 26. Be it further enacted, That the power of contracting so as to bind the corporation is hereby declared to be vested exclusively in the board of mayor and aldermen, and any city officer who attempts to impose liability upon the corporation by act of his, without first obtaining authority of the board of mayor and aldermen, shall be liable to removal from office in the manner provided by this charter, and in no event shall the city be liable for any such claim or demand.

Appropriation of public funds not to be made for private use.

SEC. 27. Be it further enacted, That the board of mayor and aldermen may, at any regular meeting, order the payment, out of the city treasury, of any claim or demand against the city authorized by them, and the consideration whereof was to the use of the corporation as defined by this charter; and appropriation of public funds shall not be made to any private use or advantage as distinguished from the interest of the corporation save by a vote of six aldermen, and then in no sum exceeding five hundred dollars.

Additional powers of mayor and aldermen.

SEC. 28. Be it further enacted, That the following additional powers may be exercised by the board of mayor and aldermen by ordinance adopted at any regular or special meeting:

To make quarantine and health regulations.

ART. 1. To adopt such regulations, and enforce the same, as may be deemed proper to prevent the introduction or spread of any contagious, epidemic, or infectious disease, and if ne'ssary to this end to establish quarantine regulations and enforce the same within ten miles of the city.

Privilege taxes.

30 ART. 2. To levy and collect for corporation purposes a privilege tax upon the business, trade or employment of all auctioneers, grocers, merchants, brokers, bankers, cotton factors, and cotton sellers, retailers, taverns, hotels, boarding-house keepers, coffee-house keepers, retail liquor dealers, confectioners, peddlers, junk dealers, and others of like character, as the board may designate, and to issue license therefor in such mode and for such time, not exceeding one year, as they may determine, and regulations governing their conduct, and inforce the same by proper penalties; the tax on retail liquor dealers or coffee house dealers not exceed one hundred and fifty in any one year.

Hacks, carriages, and other vehicles.

ART. 3. To license, tax and regulate all hacks, carriages, omnibusses, carts wagons, and drays employed within corporate limits as public carriers of persons and property, and to prescribe the rates to be paid by the public for their use within the city and to the national and city cemeteries.

Theatres, circuses.

ART. 4. To license, tax and regulate all thea'rical, circus, or other exhibitions, shows and amus'ments within the city, and close up, suppress or abate the same by means of the police force whenever in the judgement of the board the morals or the interests of the city demand it.

To suppress gambling, disorderly houses, etc.

ART. 5. To prohibit and suppress or regulate all gam' houses, disorderly houses, dance houses, and houses of ill-fame or prostitution, and provide for the punishment by fine and imprisonment of all persons engaged in or conducting the same, and the city court is hereby empowered to employ the police force of the city in the most efficient way to bring to punishment those violating ordinances of

the city adopted for the suppressions of the here de-
31 scribed, and said force shall be subject to its orders for that purpose.

ART. 6. To restrain and punish all vagrants, mendicants, and street beggars, and declare and define who are such. Vagrants.

ART. 7. To establish and regulate a workhouse in the city for the confinement of all persons sentenced to imprisonment by the city court for violation of the ordinances of the city, and persons held under arrest for trial for offenses against the city ordinances and laws. Persons sentenced to the workhouse for the non-payment of fines may be employed in any city work by direction of the board of mayor and aldermen, at the rate of fifty cents per day until the sum of the fine is worked out, and those sentenced for a specified time may be so employed for the term of their imprisonment. It is hereby made the duty of the city marshal to keep in safe custody the city prisoners, and report the same from time to time for work on the public streets, under the direction of the board of mayor and aldermen, and shall provide good and sufficient food for the city prisoners, for which he shall be allowed compensation not exceeding thirty cents a head per day. Workhouse regulations.

ART. 8. To compel the occupants of any building in the city that is filthy or unwholesome, to cleanse or remove the same, to compel the cleaning of the yard, area, or street, or alley adjoining the building, or have the same done at the expense of the property. Health regulations.

ART. 9. To provide for the government and internal arrangement of the city cemetery, and make a quarter-yearly appropriation, out of the city treasury, of any sum not exceeding five hundred dollars, to be expended for and about the cemetery grounds, under their direction, for such substantial and ornamentel improvements and additions as in their judgment should be made. City cemetery.

ART. 10. To provide for the building, renewing, or Building sidewalk and gutters.
32 repairing of all sidewalks and gutters in the city, with stone, brick, or wood, at the expense of the property upon which the same may front, properly apportioned; and in the event of the failure or refusal of the property owner to build, renew or repair the sidewalk and gutters fronting on his property, at his or her cost, within the time and in the manner that may be prescribed by the board of mayor and aldermen, to provide for having the same done at the expense of the city; in such case it shall be the duty of the city marshal to report in writing to the assessor and collector the cost to the city of such work upon the front of each lot, or part of lots, of each owner, and the assessor and collector shall assess the same upon said property with twenty-five per cent. damages, with the next accruing city taxes, to be collected thereon, and collect the same with said taxes in the same mode and manner as provided herein for the collection of city revenue from real estate, the city in all cases being required to establish the proper grades of such work in the first instance. Manner of providing for expense. Establishing grades of streets.

ART. 11. To establish all necessary regulations for the protection of all sidewalks gutters, and streets from injury by

improper use, and from being in any manner impeded to the public use, and enforce the same by proper penalties.

Dogs, hydrophobia.

ART. 12. To provide for the destruction or confinement of all dogs in the city, as may in their judgment be ne'ssary at certain seasons of the year, to prevent the introduction or spread of hydrophobia, or to provide by ordinance for taxing and muzzling the same.

Drainage.

ART. 13. To compel the owners of lots and areas within the city to construct, at their own proper cost, sufficient and effective drainage for the same to the public sewers or gutters, so as to prevent damage to adjacent property or injury to the public health.

Street railway.

33 ART. 14. To grant the right of way to lawfully created and organized companies for the construction of street railways upon the streets and through the public property of the city, and to regulate the running of cars thereon, whether such cars are to be propelled by steam or horse power, in such manner as to prevent accident to life or property, and to promote the security, comfort and convenience of the inhabitants.

Power to purchase and sell real estate.

ART. 15. To purchase and hold real estate within the city limits for public purposes; also to purchase any real estate condemned for taxes, in such mode and by such officer as they may direct, and to sell real estate when they deem it expedient.

Market house. Wharfs, docks, water crafts.

ART. 16. To erect market houses and regulate the same.

ART. 17. To erect, repair, and regulate public wharfs and docks, and fix the rates of wharfage thereat, and to regulate the stationing, anchorage, and mooring of vessels or other water crafts within the limits of the city.

Fire department.

ART. 18. To provide for the prevention and extinction of fires; to regulate, restrain, or prohibit the erection of wooden buildings in any part of the city; to regulate the carrying on of manufactories dangerous in causing or producing fires; to authorize the Vicksburg Firemen's Association to organize and maintain fire companies; to contract with the Vicksburg Firemen's Association for the proper carrying on of the fire department, and that they, board of mayor and aldermen, shall have the power to provide a revenue for the support of the Vicksburg Firemen's Association by levying a special fire tax, and which shall be collected by the assessor and collector of taxes at the same time and in the same manner as all other taxes are collected. Said tax shall not exceed three mills on each dollar of all the taxable property within the corporate limits of the city of Vicksburg.

Fire tax.

To regulate combustible material.

34 ART. 19. To regulate the storage of gunpowder, all combustible material, and the use of lights, candles, and stove pipes in all stables, shops, and other places.

ART. 20. To regulate the speed of horses and carriages in the city, so as to secure the saf'ty of the citizens.

Power to have street paved and manner.

ART. 21. To have full power to cause or procure any street or alley in said city now established or hereafter to be established to be paved or turnpiked at the cost and expense of the lots or a part of lots fronting the same, to be appor-

tioned on said lots according to their number of lineal feet fronting on said streets or alley in the city as hereinafter provided. And a majority of the board upon a petition in writing of a majority of the owners of lots or parts of lots, or of the owners of a greater part of the lots fronting on any square upon the street or alley proposed to be so improved, may authorize a written contract for the paving or turnpiking the street or alley fronting such square. The entire cost of all the grading of such work and the paving or turnpiking of streets into sections, together with one-third of the cost of the remainder of the work, shall be borne by the city, and paid out of the city treasury. The remaining two-thirds of the cost of the improvements shall be borne and paid by the owners of the lots fronting thereon as above directed. Upon the completion of the work, should the owner of any lot or part of a lot, subject to assessment for the cost of such improvement, fail or refuse to pay what is due thereon in accordance therewith, it shall be the duty of the assessor and collector to cause the amount, with twenty-five per cent. damages, to be assessed against the property with the next accruing taxes, and collect the same with said taxes as a part thereof. The assessor and collector shall collect from the several property owners their proportion of
35 the cost of the improvements authorized by this section and pay the same to the city treasurer, who shall hold the same as a special fund, subject to the terms of the contract.

ART. 22. To control the grade of, lay out, and establish, alter, and extend all needful streets, highways, roads, and alleys within the limits of the corporation as to them shall appear necessary and expedient for the public interest and use of the corporation, subject to the provisions of this charter relating to paying the same, or if for such purposes or other purposes of interest and use to the corporation the ground of any person or persons or body corporate, if necessary to be had, and the board of mayor and aldermen shall be unable to purchase the same by private contract with the owner or owners thereof at what said board shall determine a fair valuation, the said board shall petition a judge of the circuit court of Warren County, setting forth the facts of the case, and thereupon the said judge shall make an order upon the clerk of said court to require him to issue a writ of ad quod damnum, directed to the sheriff of said county of Warren, commanding him to summon a jury of twelve disinterested freeholders, citizens and taxpayers of said city of Vicksburg, to go upon the grounds sought to be acquired to the corporation and assess the value of the same in legal tender. The owner or owners of said property or their duly constituted agents or representatives shall be served with notice of the time and place of the meeting of the jury at least ten days previous thereto. Before entering upon the discharge of their duty, the jury shall be sworn by an officer qualified to administer an oath, well and truly to assess and true verdict render of the value of the property in question upon such
36 testimony as may be placed before them and their

Power to lay-out, grade new streets, etc.

Condemnation ad quod damnum.

Jury.

view of the premises. The jury, upon hearing the sworn testimony and viewing the premises, shall make up their verdict of the value of the property and the amount to be paid to the several owners thereof, if there be more than one, and return the same in writing to the sheriff, who shall immediately declare the same to parties to the proceeding; and the board of mayor and aldermen, upon paying the owners of said property or their duly constituted agents or representatives in currency the sum assessed by the jury aforesaid, or tendering the same within five days after the day of the verdict of the jury, shall become invested to the use of the corporation, and subject to purpose for which it was acquired, with all the rights, title, and interest in and to said property of the owner or owners thereof; and the owner or owners shall be forever barred of any property, right, or interest in and to the same: Provided, however, that either the board of mayor and aldermen, or owner or owners of the property, shall within five days of the verdict of the jury caused to be served upon the other party, their agent or representatives, by the sheriff, a notice in writing will at the next ensuing term of the circuit court of Warren County petition the court for an order to have the question of value tried de novo before a jury of the court empanelled for that purpose, which order it shall be the duty of the court to grant and have power within the first five days of them; the placing of such notice in the hands of the sheriff shall have the effect to suspend further proceeding of the verdict of the jury to await the action of the circuit court. Should the parties seeking the appeal fail to obtain the order of the court in accordance therewith, the court may enter an order finally by excluding him or them from further hearing in the matter and declaring the verdict thereof. The verdict of the second jury, if had shall be final and conclusive upon the parties. The
37 sheriff shall carefully prepare and return properly endorsed to the clerk of the circuit court of Warren County all the papers that come to his hands in these proceedings, to be by said clerk filed with the petition, and a final record of the same shall be made by him as in other cases of final judgment in his court. In such cases as writ of ad quod damnum the clerk, as soon as his final record is completed, shall receive for his services ten dollars, the sheriff five dollars, the officer swearing the jury and witnesses five dollars, and each juror one dollar, to be paid by the board of mayor and aldermen upon the bill of cost rendered approved therein.

No powers except special is conferred or necessary to carry out conferred powers.

ART. 23. To pass ordinances and make all orders lawful and necessary to the proper execution for the powers conferred and laws declared in the provisions of this charter, but no act done or appropriation made of the said board of mayor and aldermen shall be valid and binding upon the corporation unless falling within the express provisions of this charter or impliedly necessary to the execution of the laws and powers thereto conferred and declared.

Appeals from city courts.

SEC. 29. Be it further enacted, That any appeals from the judgment of the city court in cases arising under the ordi-

nances of the city shall only be had to the board of mayor and aldermen, and the terms and method of the same shall be prescribed by ordinances of the board. In all cases arising under the State laws where the city court exercises the jurisdiction as a justice of the peace ex-officio, the general law of appeal in such cases shall govern.

Assessment of property by assessor and collector, mode.

SEC. 30. Be it further enacted, That all assessments of the values of real and personal property, subject to taxation in the city, shall be made by the city assessor and collector, by application to the property owner for a sworn statement of values thereof, and said assessor and
38 collector is hereby empowered to administer an oath for that purpose. Should the property owners, after reasonable inqu'ry by the assessor and collector, be not found, that officer shall assess the property at a fair valuation and list is as the property of "owners unknown." Should any property holder render a valuation of their property less than what the assessor believes it reasonably to be worth, he shall report the property owner and assessment as given, to the board of mayor and aldermen, at a time to be prescribed by them, with his statement of what he conceives to be reasonable taxation value of his property. This report of the assessor and collector shall be received and considered by the board at such time and upon such notice to the owners of the property as they may determine proper, and they shall have the power of finally determining the taxable value of the property referred to them by the assessor and collector.

Property subject to taxation.

SEC. 31. Be it further enacted, That all property and estate, real, personal or mixed, situated or belonging in said city, such as town lots, parts of lots, and parcels of grounds with the buildings and improvements belonging to the same, watches and jewelry, and gold or silver plate, goods, wares, and merchandise, horses, carriages, carts, drays, and other vehicles, stocks or bonds not exempt by law, money on hand, on deposit or at interest, the net value of all obligations, and all demands or dues owing or accruing to any corporation, firm, or inhabitant of the city, from persons, corporations, or firms within or without the same, all interest or corporations, companies or copartnerships, share in national banks beyond the proportionate value of the capital stock in the United States bonds, except in so far as the same are exempt by law, in steamboats and other water crafts, in railway cars and other movable property
39 and all kinds, qualities, and descriptions of property not above mentioned within the city of Vicksburg, shall be assessed and listed for taxation at the fair and full worth and market value and price of the same. The method of fixing the taxable valuation of stocks of merchandise shall be prescribed by ordinance of the board of mayor and aldermen; Provided, however, that the following property and none other shall be exempt from taxation: The property of the United States, of this State, of Warren County, of said city, of public schools, of seminaries of learning, of churches, and of religious, benevolent, literary, and scientific associations, and all bills or notes given in whole or in

Exempt from taxation.

part payment for property within said city, subject to taxation, and the property of all incorporated companies for the prevention of fires, as far as the same is used for such purposes, and not for rental, profit or speculation, together with two hundred and fifty dollars' value of household furniture, owned by the head of a family: Provided further, that the mayor and aldermen have power to exempt manufactories for a period not to exceed years.

Mode of taxing railroad property

SEC. 32. Be it further enacted, That the property of railroads which may pass through or terminate in said city may be assessed to the corporation, owners, or agents as the same may be known, and the property assessed shall be real estate and improvements situated in said city. All machinery and other property remaining thereat, and a proportional value of rolling stock of said city, which proportionate value shall be ascertained by taking the proportion which the length of track in said city bears to the length of the main track of said railroad in the State, and the same proportion of the value of the rolling stock shall be assessed; but street railroads may be assessed as other corporations.

Annual "ad valorem" tax.

SEC. 33. Be it further enacted, That the board of mayor and aldermen shall have power by ordinance to levy and collect an ad valorem tax annually, not exceeding one and a half per cent., upon the property hereinbefore rendered, subject to assessment for taxes, for general corporation purposes, and the same shall be payable on or before the first day of December of each year.

Annual assessment.

SEC. 34. Be it further enacted, That the assessor and collector shall make an annual assessment of the real and personal property in the city subject to taxation, for corporate purposes, under the provisions of this charter, said assessment to conform to such time and method as may be prescribed therefor by ordinance of the board of mayor and aldermen. He shall collect all taxes levied by authority of the board, at such time and in such manner as may be by them directed and make deposit of taxes collected with city treasurer, at the expiration of each month. In each case of the payment of a license tax, he shall certify to the city clerk the name of the person paying the same, the amount of the tax, the character of business and term of license paid for, and the clerk shall thereupon issue to the person applying, a license under the seal of the city, in accordance with the certificate, and for each license so issued the clerk shall receive twenty-five cents, to be paid by the party procuring it, said sum to be paid by the city clerk to the city treasurer. The board of mayor and aldermen shall provide him with assessment rolls, tax lists, and receipts necessary to the conduct of his office; he shall preserve in his office all proper records and proceedings had thereon; for his services as assessor and collector he shall receive a commission of one and a half per cent. upon all taxes actually collected by him annually for the corporation, to be retained by him monthly out of his collections, reported to the board of mayor and aldermen, upon the approval of said reports by the board; he shall

Commissions of assessor & collector.

not be permitted to retain as his commission more than the actual amount above specified from any one class or kinds of taxes authorized to be collected. The board of mayor and aldermen shall provide an office for the assessor and collector and furnish the same in such manner as they may deem ne'ssary.

Mayor's quarterly reports.

SEC. 35. Be it further enacted, That it is hereby made the duty of the mayor to make to the board of aldermen, on the first Monday in January, April, July, and October, of each year, a report of the expenses of the corporation for the preceding quarter, and an estimate of the probable expenses of the city for the quarter next ensuing, for the purpose of enabling the board to limit the corporation expenditures within the sum of the probable resources of the city properly apportioned for that quarter; and it is hereby expressly charged upon the board of mayor and aldermen to limit and restrain the expenditures for corporation purposes within the revenues of the city heretofore provided for.

Limit of city expenditures.

Bank of deposit.

SEC. 36. Be it further enacted, That the board of mayor and aldermen shall annually, and oftener if ne'ssary, designate some bank of the city as the bank of deposit of the city, which said bank shall, before receiving the deposits of the city, enter into a bond in like sum, with like conditions as that of the mayor. The city treasurer shall, at least once a week, deposit in said bank all money in his hands belonging to said city; and said bank shall render a monthly account to the mayor and aldermen of the receipts and disbursements made by them on account of said city, together with vouchers to prove the correctness of said account.

Property of the city exempt from execution.

SEC. 37. Be it further enacted, That all property owned and held by the mayor and aldermen of the city of Vicksburg in their corporate capacity, for the use of the public, and such as may be hereafter acquired by them for that purpose, shall be exempt from seizure and sale under any attachment or judgment rendered against them; but should the board of mayor and aldermen fail or refuse to levy the tax herein authorized to pay off and discharge their ascertained lawful indebtedness, any person bringing the proper evidence of such indebtedness shall be entitled to a mandamus against said board to compel such a levy in accordance with the provisions of this chapter, but in no case shall any creditor of the city be allowed for discount upon any warrant issued to him in person, and of any allowance made by the board of mayor and aldermen.

42

Mandamus.

No discount on warrants.

Dues and debts to be payable in scrip.

SEC. 38. Be it further enacted, That all dues of any kind to the city shall be payable in city paper, or evidence of city indebtedness, and all salaries or fees due to the city officers shall be receivable in the same.

SEC. 39. Be it further enacted, That the mayor and aldermen shall have power to order and direct the levy and collection of taxes for corporation purposes upon all property made subject to taxation by this charter, and provide for the seizure, sale, and conveyance of delinquent property for the taxes assessed thereon, and damages not exceeding twenty-five per cent.; all real estate sold in pursuance of a

city ordinance shall be subject to redemption for one year after the sale in a manner to be prescribed by ordinance of the board of mayor and aldermen; after the period of redemption has expired the purchaser shall be vested with an indefeasable title to the property as against all persons whomsoever. Sales of personal property for taxes shall be made upon such terms and in such manner as the board may by ordinance prescribe.

Provisional officers, etc.

SEC. 40. Be it further enacted, That the officers of
43 the corporation of the city of Vicksburg be constituted at the time of the passage of this act, shall continue in office under existing laws, until the first Tuesday of September, 1876, and the present mayor and aldermen of the city of Vicksburg shall provide for holding the first election according to the provisions of this act.

Election of new corporation.

Power to borrow money, and provisions to pay.

SEC. 41. Be it further enacted, That the said city of Vicksburg shall have full power to borrow money to an amount not exceeding forty thousand dollars per annum, at a rate not to exceed twelve per centum per annum, and to levy a tax for the payment of the same on all the taxable property within said city, at a rate not exceeding one per cent. ad valorum: Provided, That the power to borrow money as aforesaid shall not be exercised after the first day of January, A. D. 1878.

Previous city government and laws superseded and repealed.

SEC. 42. Be it further enacted, That this act shall supersede all charters and laws for the government of the city of Vicksburg which may be in existence upon its passage; that all laws and parts of laws in conflict with this act be, and the same hereby are, repealed, and this act shall take effect and be in force from and after its passage.

Approved April 7th, 1876.

OFFICE OF SECRETARY OF STATE,
Jackson, Miss.

I, James Hill, secretary of state, do certify the act hereto attached, entitled "An act to constitute the inhabitants of the city of Vicksburg a body politic and corporate, and to define the boundaries of said city," is a true and correct copy of the original now on file in this office.

Given under my hand and the great seal of the State of Mississippi, hereunto affixed, this 29th day of April, 1876.

[SEAL.]

JAMES HILL,
Secretary of State.

44 (Endorsed:) Filed June 2, 1876. Geo. T. Swann, clerk.

And afterwards, to wit, on the 3d day of June, A. D. 1876, being a day in said term aforesaid of said court, a demurrer was filed in said cause, which is in the words and figures following, to wit:

In the circuit court of the United States, southern district of Mississippi.

MARY TOBIN ET AL.
vs.
MAYOR AND ALDERMAN CITY OF VICKSBURG. } 2331.

The plaintiffs demur to the plea of defendant filed in this cause on 2d day of June, 1876, on the following grounds:

1. Said plea does not contain any averment of facts which constitute a defense to said action in whole or in part.

2. Said plea does not contain any statement of facts which show that the corporate existence of said city has ceased or expired, or been abolished.

3. Said plea does not set up the substance of said act of the legislature therein referred to.

PITTMAN & PITTMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed June 3, 1876. Geo. T. Swann, clerk.

And on the day and date last above mentioned an order was made in said cause, which is in the words and figures following, to wit:

45 In the circuit court of the United States for the southern district of Mississippi, May term, A. D. 1876, June 2d, A. D. 1876.

MARY TOBIN ET AL.
vs.
MAYOR AND ALDERMAN OF THE CITY OF Vicksburg. } 2231.

The demurrer of the plaintiffs to the plea of the defendant having been duly considered by the court, it is considered that said demurrer is well taken, and it is ordered and adjudged that the same be sustained and defendant have leave to plead in twenty days.

R. A. HILL, *Judge.*

And afterwards, to wit, on the 6th day of June, A. D. 1876, being a day in said term aforesaid of said court, the following pleas were filed, which, with the endorsement thereon, are in the words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi, November term, A. D. 1875.

MARY TOBIN AND JOHN W. TOBIN, HER HUSBAND,
vs.
THE MAYOR AND ALDERMAN OF THE CITY OF Vicksburg.

1st. And comes the defendants, by their attorney, and defends the wrong, injury, &c., and for plea in this behalf say that they were
46 not indebted to plaintiff for money had and received, as charged in plaintiffs' declaration, for defendants' use.

2d. And defendants further say they did not undertake and promise in manner and form as stated in plaintiffs' declaration.

3d. And for further plea in this behalf defendants deny each and every allegation in plaintiffs' declaration contained, and put themselves upon the country.

4th. Defendants further say that the ordinance of the city of Vicksburg referred to in plaintiffs' declaration has never been enforced against plaintiff, in manner and form as charged, or any other person, and that no distinction has been made between plaintiffs' boats and

other boats on account of tonnage; and of this they put themselves upon the country.

5. And for further plea defendants say that they are the owners in their corporate capacity of the landing in front of the city of Vicksburg where plaintiffs' said boats landed when said charges were made, and as such owners were entitled to charge for the use and occupation of said landing; and of this they put themselves upon the country.

WARREN COWAN,
Attorney for Defendants.

(Endorsed:) Filed June 6, 1876, by order of Judge Hill. Geo. T. Swann, clerk.

47 And afterwards, to wit, on the 29th day of November, A. D. 1876, being a day in the November term, A. D. 1876, of said court, the following pleas were filed in said cause, which, with the endorsements thereon, are in the words and figures following, to wit:

MARY TOBIN ET AL.
vs.
MAYOR AND ALDERMAN OF THE CITY OF Vicksburg. } 2231.

And the said defendants, by their attorneys, come and defend the wrong and injury, when, &c., and for plea say that they did not undertake and promise, in manner and form as the plaintiff hath above thereof complained against them; and of this they put themselves upon the country, and the plaintiff doth the like.

BUCK & CLARK.
CATCHINGS & INGERSOLL.
W. L. NUGENT.

(Indorsed:) Filed by leave of court November 29, 1876. Geo. T. Swann, clerk.

MARY TOBIN AND JOHN W. TOBIN
vs.
THE MAYOR AND ALDERMAN OF THE CITY of Vicksburg. } 2231.

And for further plea in this behalf the said defendants say they did not at any time within three years next before the institution of
48 this suit undertake or promise in manner and form as said plaintiffs in their declaration herein hath complained, and this they are ready to verify.

CATCHINGS & INGERSOLL,
BUCK & CLARK,
Att'ys for Defendants.

Mary Tobin and John W. Tobin, plaintiffs, of Messrs. Pittman & Pittman, your attorneys of record:

You are hereby notified that upon the trial of said cause, the defendants, under the general issue pleaded therein, will in bar of said action show in evidence on their behalf—

1st. That before and during the period covered by the payments of wharfage dues sought to be recovered by plaintiffs herein, said defendants were the owners in possession of the landing used by plaintiffs'

boats, and said dues paid by plaintiffs were but a reasonable compensation for the use of said landing by their boats in their business as carriers of freight and passengers.

2d. That said wharfage dues paid defendants by plaintiffs were necessary to compensate them in expenditures by them incurred in maintaining the landing used by plaintiffs' boats, in repair and proper condition for said use, and that said dues were specially set apart and appropriated by defendants for that purpose.

3d. That the plaintiffs voluntarily paid said dues for the recovery of which this action is brought.

CATCHINGS & INGERSOLL,
BUCK & CLARK,
W. L. NUGENT, *For Defendant.*

(Endorsed:) Filed by leave of court November 29th, 1876. Geo. T. Swann, clerk.

49 And on the day and date last above mentioned the following demurrer was filed in said cause, in words and figures following, to wit:

MARY F. TOBIN AND JOHN W. TOBIN
vs.
THE MAYOR AND ALDERMAN OF THE CITY OF Vicksburg. } 2231.

And now comes the said plaintiff, by attorney, and demurs to the plea of said defendant whereby it is alleged that said defendant did not undertake or promise in manner and form as alleged in said declaration within three years next before the institution of said suit, and assigns as cause of demurrer—

1st. That said plea constitutes no defense to said action.

2d. That said action is not one which is required by law to be brought within three years after the accrual thereof.

PITTMAN & PITTMAN,
Att'ys for Pl'ff.

(Endorsed:) Filed November 29, 1876. Geo. T. Swann, clerk.

And thereupon, on the day and date last above mentioned, being a day in said term aforesaid of said court, an order was made in said cause, in words and figures following, to wit:

50 In the circuit court of the United States for the southern district of Mississippi, November term, A. D. 1876, November 29, A. D. 1876.

JOHN W. AND MARY TOBIN
vs.
THE MAYOR AND ALDERMAN OF THE CITY of Vicksburg. } 2231.

This day came the parties by their attorneys, and thereupon, by consent of parties and with the assent of the court, the defendants withdrew the pleas heretofore filed by them under the order to answer, and filed their pleas of the general issue and of the statute of limitations; and thereupon the plaintiffs' demurrer to the said plea of the statute of limi-

SEC. 4. That this ordinance shall be in force from and after its passage.

Ordained and published this 12th day of July, A. D 1865.

T. J. RANDOLPH, *Mayor.*

A true copy.

[SEAL.] FRANK S. LAWRENCE,
City Clerk.

That the usual mode of collection was as follows: When plaintiffs' boats landed at the city of Vicksburg, the wharf and harbor master, a bonded officer of said city, whose duty it was to collect wharfage under said ordinance, would go aboard of said vessel and demand the wharfage, at the same time tend'ing the plaintiffs or their agent, the master of the vessel, a receipt therefor, in the words and figures as follows, to wit:

VICKSBURG, MISSI.

Steamer *to the city of Vicksburg, Dr.*

For wharfage to this date, ten dollars, $10.

55 Received payment,

THOMAS BROADWATERS,
Wharf & Harbor Master.

On the back of which rec ipt the above-mentioned ordinance is printed in red ink in full; that one-half of the amount collected of plaintiffs was collected within three years, and the balance within six years preceeding this suit; that one hundred dollars of the above sum was collected of plaintiffs while Vicksburg was the terminal point of their boats, at the rate of ten dollars per week; that the wharfage collected from boats went into the city treasury and became a part of the general fund of the city, and was paid out under appropriations of the board of mayor and alderman of said city as other general funds were; that on the 25th day of August, 1869, another ordinance was passed and adopted by the said city authorities, in these words, and the same has never been repealed, to wit:

An ordinance to repeal a provision of an ordinance, and to provide for a landing fund.

SEC. 1. Be it ordained by the board of mayor and council of the city of Vicksburg, That from and after this date it shall not be lawful for the wharf and harbor master to collect for wharfage dues from steamboats anything but current money, which shall constitute a special fund for such necessary repairs and improvements as the city landing may require to place it in good condition.

56 SEC. 2. That this ordinance be so construed that the receipt of city warrants drawn by the city clerk upon the treasurer shall be, as heretofore, receivable for all dues except those from steamboats, and that all ordinances or parts of ordinances in conflict with the provisions of this ordinance be and the same are hereby repealed, and that this ordinance take effect and be in force from and after its passage.

Ordained and published this 25th day of August, 1869.

EBIN SMITH,
Mayor.

A true copy.

[SEAL.] FRANK S. LAWRENCE,
City Clerk.

That the defendant corporation of Vicksburg has been the riparian owner of the city landing on account of which the charges herein sued for were collected since November, 1851, by virtue of a conveyance of that date from C. K. Marshall, the former owner thereof; that said landing is comprised in a river front, between Jackson and South streets, in said city, and covers a length of about eighteen hundred feet between high and low water mark; that said landing is worth fifty thousand dollars, and that defendants have expended upon the same in repairs and improvements thereon, within the past six years, forty thousand dollars; that the annual net receipts to the defendant from said landing, in the way of collections for the use thereof, do not exceed the sum of $11,500; that the landing charges sued for in this action were
57 paid periodically, as demanded, in warrants of the city of Vicksburg, drawn upon the city treasury, which were purchased by plaintiffs at a discount of five per cent. from the face of the same, and which warrants defendants received as money; that the wharf and harbor master demanded and received from each boat that landed at the said city landing ten dollars, and only ten dollars, no matter how large or how small the tonnage of the boat was, and without reference to the time the boat lay at the landing; that since the institution of this suit the defendants have continued, and still continues, to collect said wharfage in the same manner as before from plaintiffs and others; that during the six years preceding this suit the merchants' wharf boat association had a wharf boat lying at said landing, and paid the said city two thousand dollars per annum for the privilege of occupying the necessary space at the said landing with their boat; that plaintiffs' boats were accustomed to land against and make fast to said wharf boat, and not against the landing, discharging their up freights into the wharf boat and taking down freights, including cotton, from the city landing, over and across said wharf boat; that they touched the landing of the said city about twenty times during the said six years; that all other landings were made at and against said wharf boat; that when plaintiffs' boats landed at said wharf boat they paid said association its regular charges; that the only improvement made by the
58 said city at said landing was the grading and piling of the bank to prevent caving, which was done at considerable expense to said city; that the said landing was not paved nor covered with plank, and that in dry weather it was a good landing, and in wet too muddy to use as a place of deposit for freight; that no evidence was offered by plaintiffs to prove that they protested or objected verbally or in writing at the time they paid the moneys herein sued for; that C. K. Marshall, the former owner, uniformly collected wharfage from steamboats stopping or landing at said landing up to 1851, and the defendants have done the same ever since their purchase at higher rates; and that the amount charged by said city against steamboats was well known by all parties interested. And we, the jury, do say, that, if upon the foregoing statement of facts, the court should be of opinion that the plaintiffs are entitled thereto, we find for plaintiffs and assess their damages at the sum of five thousand four hundred dollars; otherwise, we find for defendants.

MARY TOBIN AND JOHN W. TOBIN
vs.
THE MAYOR AND ALDERMAN OF THE CITY of Vicksburg. } 2231.

This day came the parties, by their attorneys, and thereupon the

plaintiffs, by their attorneys, moved the court upon the special
59 verdict of the jury to render judgment in their favor for the sum of five thousand four hundred dollars, and the said motion was argued by counsel, and the court, being thereof sufficiently advised, doth order, and it is considered by the court that the said motion be, and the same is hereby, sustained, and that the plaintiffs do have and recover of the defendants the said sum of five thousand four hundred dollars, their damages, so as aforesaid assessed by the jury, and their costs herein incurred, for which let execution issue, &c. And, thereupon, the defendants, in open court, excepted to the said ruling and judgment of the court upon the said special verdict of the jury, and their exception was allowed.

And, on the day and date last above mentioned, to wit, the 2d day of December, A. D. 1876, an agreement of counsel was filed in said cause, which is in the words and figures following, to wit:

Circuit court United States, southern district of Mississippi.

MARY TOBIN AND JOHN W. TOBIN
vs.
THE MAYOR & ALDERMAN OF THE CITY OF Vicksburg. } 2231.

It is agreed by the attorneys in the above-entitled case that no bill of particulars need be filed by plaintiffs, but that the filing thereof is waived.

BUCK & CLARK,
CATCHINGS & INGERSOLL, &
W. L. NUGENT, *For Def'ts.*

(Endorsed:) Filed Dec. 2, 1876. Geo. T. Swann, clerk.

60 And afterwards, to wit, on the 15th day of Janu ry, A. D. 1877, a petition for writ of error and supersedeas was filed in the clerk's office of said court, which, with the order of the court thereon, is in the words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi.

JOHN W. TOBIN AND MARY TOBIN, HIS WIFE,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Vicksburg. } 2231.

To the hon. the judges of the said circuit court:

The petition of the defendants in the above-entitled cause respectfully represents that they feel aggrieved by the judgment of the said circuit court rendered against them at the last November term thereof, and to the end that the same be reviewed and justice done, they pray a writ of error to the next term of the Supreme Court of the United States, to operate as a supersedeas, and herewith tender bond in conformity with the statute in that behalf.

MAYOR & ALDERMEN OF VICKSBURG,
By WILLIAM L. NUGENT,
Their Attorney.

On the filing of the enclosed bond with the petition the clerk of the said circuit court will issue the writ of error and supersedeas as prayed, returnable to the next term of the Supreme Court of the United States.

R. A. HILL,
Judge District Court U. S. & Presiding Judge of the United States Circuit Court for So. Dist. Missi.

(Endorsed:) Filed Jan'y 15, 1877. Geo. T. Swann, clerk.

61 And thereupon, on the day and date last above mentioned, an appeal bond was filed in the clerk's office of said court, which is in the words and figures following, to wit:

Supreme Court of the United States.

JOHN W. TOBIN AND MARY TOBIN
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Vicksburg. } 2231.

Know all men by these presents, that we, The Mayor and Aldermen of the City of Vicksburg, by R. O'Leary, mayor, duly authorized and empowered to execute and deliver this bond in the name of and on behalf of said corporation, principal, and J. A. Klein, J. F. Baum, J. F. Doll, S. Spengler, D. Walsh, F. Bunne, Geo. H. Dorsey, Geo. Just, W. L. Trowbridge, Alexander Kuhn, Isaac Hirsch, I. Brown, E. S. Butts, Lee Richardson, John B. Reid, F. Loyd, W. H. Andrews, O. H. Perry, Wm. Muller, Joseph Podesta, Geo. M. Klein, B. H. Polk, G. G. Pegram, M. McManus, and E. W. Wallin, sureties, are held and firmly bound unto John W. and Mary Tobin in the sum of six thousand five hundred dollars, to be paid to the said John W. and Mary Tobin, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents, sealed with our seals, and dated this the 26th day of December, 1876.

Whereas the above named The Mayor and Alderman of the
62 City of Vicksburg hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the circuit court of the United States for the southern district of the State of Mississippi in the above styled cause: Now the condition of this obligation is such, that if the above named The Mayor and Alderman of the City of Vicksburg shall prosecute their writ of error to effect, and answer all

damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE MAYOR & ALDERMAN OF THE CITY OF VICKSBURG,
[SEAL OF CORPORATION.] By R. O'LEARY,
Mayor, with Seal of Corporation.

J. A. KLEIN.	[SEAL.]
J. F. BAUM.	[SEAL.]
J. F. DOLL.	[SEAL.]
S. SPENGLER.	[SEAL.]
D. WALSH.	[SEAL.]
F. BUNNE.	[SEAL.]
GEO. H. DORSEY.	[SEAL.]
GEO. JUST.	[SEAL.]
W. L. TROWBRIDGE.	[SEAL.]
ALEXANDER KUHN.	[SEAL.]
ISAAC HIRSCH.	[SEAL.]
I. BRUNO.	[SEAL.]
E. S. BUTTS.	[SEAL.]
LEE RICHARDSON.	[SEAL.]
JOHN B. REID.	[SEAL.]
F. LOYD.	[SEAL.]
W. H. ANDREWS.	[SEAL.]
O. H. PERRY.	[SEAL.]
63 WM. MULLER.	[SEAL.]
JOSEPH PODESTA.	[SEAL.]
GEO. M. KLEIN.	[SEAL.]
B. H. POLK.	[SEAL.]
G. G. PEGRAM.	[SEAL.]
M. McMANUS.	[SEAL.]
E. W. WALLIN & CO.	[SEAL.]

I approve the foregoing bond and sureties.

R. A. HILL, *Judge.*

(Endorsed:) Filed January 15th, 1877. G. T. Swann, clerk.

UNITED STATES OF AMERICA,
Southern District of Mississippi, sc:

I, George T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi, 5th judicial circuit, do certify that the above and preceding annexed sixty-two (62) pages contain a true and complete transcript of the record of said court in the cause lately pending and determined therein, wherein Mary Tobin and John W. Tobin were plaintiffs and The Mayor and Aldermen of the City of Vicksburg were defendants, as the same remains of record therein, together with a true copy of the writ of error and supersedeas bond therein, as the same remains of record and on file in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Jackson, this 22nd day of March, in the year of our Lord 1877.

[SEAL.] GEO. T. SWANN, *Clerk.*

CLERK'S OFFICE,
U. S. Circ't C't So. Dist. of Miss.:

Rec'd of pl'ff in error, by W. L. Nugent, esq., att'y, twenty-two dollars 11 cents, in full of fee for this transcript.

March 22nd, 1877.

[SEAL.] GEO. T. SWANN, *Clk.*

64 UNITED STATES OF AMERICA, *ss :*

To John W. Tobin & Mary Tobin, his wife, or their att'ys of record, Messrs. Pittman & Pittman:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein the mayor & alderman of the city of Vicksburg are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this day of Jan'y, in the year of our Lord one thousand eight hundred and seventy-six.

R. A. HILL,
District Judge & Presid'g Judge of the Circuit Court of the United States for the Southern District of Mississippi.

65 We hereby acknowledge service of the within citation and waive copy thereof.

PITTMAN & PITTMAN,
Att'ys for John W. Tobin & Mary F. Tobin.

(Indorsed:) 2231. To Octo. term, 1877. Sup. Ct. U. S. Mayor & Aldermen of Vicksburg vs. John W. & Mary Tobin. Citation on error. Filed Jan'y 19th, 1877. Geo. T. Swann, clerk. Nuzent, att'y.

UNITED STATES OF AMERICA,
Southern District of Mississippi :

I, R. S. Buck, one of the attorneys for the defendants in the case to which this process relates, do hereby certify under oath that I served the citation upon Messrs. Pittman & Pittman, att'ys for plaintiff, by handing the same to Wm. Pittman, of said firm, to read, which he did, and waived service of copy of same, as will appear by his acknowledgement of service of same.

R. S. BUCK.

Subscribed & sworn before me this January 17th, 1877.

LAZ. LINDSAY,
U. S. Com'r.

(Indorsement on cover:) No. 148. The Mayor and Aldermen of the City of Vicksburg, plaintiffs in error, vs. John W. Tobin and Mary Tobin S. Mississippi C. C. U. S. Filed 4th June, 1877.

In Supreme Court of the United States.

October Term, 1879.

City of Vicksburg
vs.
Tobin.
No. 148.

P. PHILLIPS,
For Plaintiff in error.

R. O. Polkinhorn, Printer, 632 and 634 D Street, N. W.

In Supreme Court of the United States.

October Term, 1879.

City of Vicksburg
vs.
Tobin.
No. 148.

Brief of P. PHILLIPS, for Plaintiff in Error.

This is an action in the Circuit Court for Southern District of Mississippi, to recover from the City certain sums of money paid to it for wharfage dues.

The judgment was rendered on a special verdict, which finds (29) that the ordinance under which the collection was made, provides that all steamboats landing at this city shall pay wharfage at the following rates:

Sec. 1. All packets terminating their trips at this City, per week $10. All steamboats passing and repassing, for each landing, as follows: All steamers exceeding 1,000 tons $10; for each steamer exceeding 1,000 tons, for every 100 tons excess, at the rate of $1.00. Circus or exhibition boats to pay $5.00 per day.

Sec. 2. That if the captain or officer in command of any steamboat or water-craft shall refuse to comply with the provisions of this ordinance, on conviction thereof before the Mayor of said City, the captain or officer in command of such steamboat or water-craft shall be liable for, and pay the sum of $50 with costs of suit, and said boat shall be

charged at the rate of $100 for each landing thereafter until the settlement of said litigated claim.

SEC. 3. That all ordinances and parts of ordinances conflicting with the provisions of this ordinance be, and the same are hereby, repealed.

SEC. 4. This ordinance shall be in force from and after its passage. Ordained and published this 12 day of July, A. D. 1865.

That the mode of collection was by the Harbor Master going on board the vessel and demanding the wharfage, tendering a receipt, on the back of which was a printed copy of the ordinance.

That these collections went into the City treasury and became a part of their general fund.

That by a subsequent ordinance of 25 August, 1869, these dues were required to be paid in current money, and were to "constitute a special fund for such necessary repairs and improvements as the City landing may require to place it in good condition."

That all the collections sued for were made subsequently to the date of this second ordinance.

That the city became riparian owner by purchase, in 1851, of the landing for which the dues were collected; that it had a length of 1,800 feet, and is worth $50,000.

That the city has expended, in the past six years, $40,000 in repairs and improvements, and the annual net receipts thereof do not exceed $11,500.

That the landing charges sued for were paid periodically in city warrants purchased at a discount of 5 per cent.

That the Harbor Master received from each boat that landed on said landing only $10, no matter how small or large the tonnage was, and without reference to the time the boat lay at the landing.

That during the six years preceding this suit, the "Wharf Boat Association" had a boat lying at this landing, for which they paid the city $2,000 per annum.

That the plaintiff's boats were accustomed to land against, and make fast to, said wharf-boat.

That they touched the landing of said city about twenty times during the said six years, and that at all other times their landings were made against the wharf-boat, for which they paid the "Association" its regular charges.

That the only improvement made by the city at said landing was the grading and piling, to prevent caving, which was done at a considerable expense.

That, prior to the purchase by the city, C. K. Marshall, the former proprietor, uniformly collected wharfage, but at less rates than those charged by defendant.

In conclusion, the jury find that no evidence was offered by plaintiffs to prove "*that they protested or objected verbally*, or *in writing, at the time they paid the moneys herein sued for.*"

Upon this verdict the motion of the plaintiffs for judgment was sustained, and judgment was rendered for $5,400, with costs;" and thereupon the defendant, in open court, excepted to the ruling of the court, and their exception was allowed. p. 32.

Assignment of error.

The ruling of the court that the facts found by the jury authorized the rendition of the judgment.

The judgment should have been for defendant.

The judgment of the court was based upon two propositions—

First. That the ordinance contravenes the provisions of the constitution which delegates to Congress the power to regulate commerce between the States.

Second. That the payment of wharfage dues by the plaintiffs was not, under the circumstances, voluntary, so as to prevent a recovery in this action.

Constitutionality of Ordinance.

The ordinance declares that "all steamboats landing at *this city* shall pay wharfage at the following rates."

But the dues collected were only for landing on that portion of the river front, 1800 feet, which the city had purchased, and which at large cost it kept in repair. These dues under the ordinance of August, 1869, were directed to be held as "a special fund for such necessary repairs and improvements as the city landing may require to place it in good condition."

We submit that the proprietary right exercised by Marshall when he was the owner of the landing, in charging wharfage dues was undoubted, and when exercised by his grantee the city was not changed in its character.

This action was commenced in 1875, shortly after the announcement of the decision in *Canonn* vs. *N. Orleans*, and is doubtless based upon a misapprehension of that decision.

The subject now under consideration is fully treated by Mr. Justice STRONG in *Packet Co.* vs. *Keokuk*. The ordinance of the city of Keokuk is like the one under consideration, and as to which the court say, "Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation, or an individual, and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property."

Reference is then had to *Canonn* vs. *New Orleans*, which while holding the ordinance in that case void, carefully guarded this right to exact wharfage, Mr. Justice MILLER saying: "It is a doctrine too well settled and a practice too common and too essential to the interests of Commerce and Navigation to admit of a doubt that, for the use of such structures erected by individual enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. Nor do we see any reason why, where a city or other municipality is the owner of such structures built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as the individual." 95 U. S., 84.

To constitute a wharf it is not necessary that the structure should be of wood or stone. Its legal definition is "A space of ground artifically prepared for the reception of merchandise for a ship or vessel, so as to promote the convenient loading and discharge of such vessel." BOUVIER.

"Wharf—a broad plain place near some creek or haven to lay goods and wares on that are brought to or from the water."

Jacob's Law Dic.

In the case of the city of Keokuk, the ordinance declared "that all the ground then lying, or which might thereafter be made between Water Street and the Channel of the Mississippi River should be declared a wharf," and that any boat that should make fast to any part of said wharf, should be liable to a wharfage fee.

This is essentially the same as the one we are considering, and the judgment rendered in the one must be applied to the other.

It may be objected that the ordinance of the City of Vicksburg refers to the *tonnage* of the boat. But the

finding of the jury shows, that these dues were collected regardless of the consideration "how large or how small the tonnage of the boat was."

Mr. Justice STRONG, in the case cited, replies to the objection there made, that "the wharfage tax measured by the carrying capacity of the vessel was a tonnage tax," and says:

"If the charge is clearly a duty, a tax or a burden, which, in its essence, is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed upon the authority of the State, and measured by the capacity of the vessel, it is, doubtless, embraced by the constitutional prohibition. But a charge for services rendered, or for convenience provided, is, in *no sense, a tax or duty.*

It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in the right of proprietorship. Wharfage is of the latter character."

"For these reasons (say the court, in conclusion), the ordinance cannot be considered as imposing a duty on tonnage. It is, in no sense, a regulation of commerce; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of Congress respecting the enrollment and license of vessels for the coasting trade." 95 U. S., 84.

This unanimous decision of the court would seem effectually to dispose of the proposition under consideration.

We may, also, call attention to the fact that the declaration, though averring that the boats from which these dues were collected "were regularly licensed and enrolled as American vessels employed in the navigation of the Mississippi River;" no evidence whatever was offered to sustain the averment, though the plea of the defendant

specifically denies "each and every allegation of the declaration."

The averment is a material one, and proof of it was essential to a recovery.

Voluntary Payment.

The second proposition is, that the payments made to the city were under such a duress as to authorize a recovery.

The jury has found, "no evidence was offered by plaintiffs to prove that they *protested* or *objected, verbally or in writing*, at the time they paid the moneys herein sued for."

Under the ordinance, the refusal to pay the wharfage dues subjected the officer in command of the boat to a suit before the Mayor for $50 and cost, with a charge against the boats at the rate of $100 for each landing thereafter, until the settlement of the litigated claim."

We submit that there is no such duress in this case as brings it within the decisions which hold the payments to be compulsory.

In *Taylor* vs. *Board of Health*, where taxes had been levied and paid for a series of years under a statute subsequently held to be unconstitutional, the payment was held to be voluntary; the court saying: "The officer did no more than demand the tax upon the supposed authority of law, and there was no more compulsion than when an individual demands a supposed right. The threat that is supposed to underlie such demands is a harmless one that in case of refusal the appropriate legal remedies will be resorted to."

31 Penn. St., 73.

In *Preston* vs. *City of Boston*, where it was held that payment of an illegal tax, under a distress warrant, was compulsory, the court say: A threat of a distress for rent is not such duress, because the party may replevy the goods

distrained and try the question of liability at law. Threat of legal process is not duress, for the party may plead and show that he is not liable.

And when a party has voluntarily paid under a claim of right there is no right of recovery, although he protested, at the time, against his liability.

12 Pick, 13.

See, also, *Benson* vs. *Munro*, 7 Cush., 125.

In *Clark* vs. *Dutcher*, there is a very full review of the cases, and the conclusion arrived at is thus stated: "Although there are a few dicta of eminent judges to the contrary, I consider the current or weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound, in law, to pay it, when, in truth, he was not. He shall not be permitted to plead his ignorance of law; and it shall be considered a voluntary payment."

9 Cow., 680.

We deem it wholly unnecessary further to cite the decisions of the State courts, for whatever may be their diversity, we consider the question to be well settled by the adjudications of this Court.

In *Elliott* vs. *Swartout*, Mr. Justice THOMPSON, delivering the unanimous opinion of the court, recites, with approbation, *Morgan* vs. *Palmer*, 2 Barn. & Cres., 729; *Brisbane* vs. *Ducres*, 5 Taunt., 154, that where "a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, voluntarily, he cannot recover it back.

There are (say the court) many doubtful questions of

law. When they arise the defendant has an option either to litigate the question or submit to the demand and pay the money; but it would be most mischevious and unjust if he, who has acquiesced in the right by such voluntary payment, should be at liberty at any time within the statute of limitations to rip up the matter and recover back the money."

10 *Pet.*, 154.

In *Sanborn* vs. *County Commissioners*, the plaintiff paid certain taxes on lands without protest, not being aware that the lands were exempt from taxation, but supposing that they were legal and valid.

After the decision of this court in *Railway Co.* vs. *Prescot*, he demanded the return of the money, which being refused he brought his action.

The judges below certified to this court their division on the question:

"Whether the acquisition of the tax certificates and subsequent payment of taxes by the plaintiff was a voluntary payment of the money sought to be recovered back in such a sense as to defeat the right to such recovery."

By the law when lands sold for taxes are bought in for the county, a tax certificate is issued to any one who shall pay into the Treasury an amount equal to the cost of redemption.

If the land is not redeemed in three years, the clerk is to execute a deed to the purchaser.

If after a certificate has been granted upon the sale, it is discovered that for any error or irregularity the land ought not to be conveyed, no deed is to be made, and the County Treasrer, upon the return of the certificate, is to refund the amount paid on such sale.

Mr. Justice BRADLEY in delivering the unanimous decision

of the court, fully considers the question certified, and determines the payment of the taxes to be voluntary.

To recover back money paid in redemption of land (he holds) there must be either fraud, mistake, or duress, and that to constitute mistake as a ground for recovery, there must be a mistake of fact and not of law.

Then, as to the question of duress, he says. "It has been questioned whether a sale, or a threatened sale, of land will constitute such duress, there being no seizure of the property, and nothing supervening upon the sale except a cloud upon the title.

Reference is then made to *Wabuskie County* vs. *Walker*, 8 Kansas, and other decisions of Kansas, in which the payment under such circumstances is held to be voluntary; and as it was the law of Kansas, the court was called upon to administer the judgment is given in conformity to the decisions of the State court.

The *Union Pacific R. R.* vs. *Board of Commissioners* (No. 669, not yet reported,) like the preceding case, was an action to recover back taxes, illegally imposed on land. The warrant in the hands of the Treasurer authorized him, in case of default, to seize and sell the personal property of the defaulter.

At the time of the several payments made, the Company filed a notice in writing that it protested against the taxes as wholly unauthorized by law, and that suit would be instituted to recover back the money paid.

The question was presented on a certificate of division, and we have again the unanimous opinion of the court delivered through the Chief Justice.

He refers to the case of *Lamborn* vs. *Commissioners*, *supra*, with the remark that, as that was a case from Kansas, we followed the rule adopted by the courts of that State as stated in *Wabuskie Co.* vs. *Walker*, "where a party

pays an illegal demand, and with a full knowledge of all the facts, which render such demand illegal without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent the immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest, does not make the payment involuntary."

It is then said: "*This, as we understand it, is a correct statement of the rule of the common law.*"

Several cases are also referred to which had been erroneously considered as countenancing the doctrine that, a protest alone was sufficient to show that the payment was not voluntary, and the opinion concludes by citing the case of *Preston* vs. *City of Boston*, (*supra*) in which C. J. Shaw, thus limits the right of recovery: "when therefore a party not liable to taxation, is called upon peremptorily to pay upon a *warrant*, and he can save himself and his property *in no other way* than by paying the illegal demand, he may *give notice* that he pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received."

In the facts of the present case, there is nothing to show such compulsion as to make the payments involuntary.

These wharfage dues were collected by the city for twenty-five years before the commencement of this action; the plaintiff had paid them for at least six years without complaint, either verbal or written; there was no warrant or execution against his person or his property; his use of the landing was voluntary; his refusal to pay would only have subjected to him to a suit for a penalty of $50, and if the decision had been against him he could have invoked the jurisdiction of this court in determining the constitutionality of the ordinance which imposed the tax.

We therefore consider it to be established by the finding of facts in this case—

First. That the city as owner of the landing is entitled to collect reasonable wharfage dues.

Second. That the payments made were voluntary, and no action will lie for their recovery.

It follows that the judgment should be reversed with directions for the dismissal of the suit.

P. PHILLIPS,
for plaintiff in error.

APPENDIX.

Provisions of City Charter.

Sec. 16 confers power to pass such ordinances as may be proper for carrying into effect the powers of the charter, with "power to prescribe such fines, penalties, and forfeitures for their violation as may be deemed expedient, not exceeding $500 for each offense, and such imprisonment of common beggars, vagrants, and disturbers of the peace, not exceeding six weeks, as they may deem expedient."

Sec. 17. The said fines, forfeitures, and penalties shall be recoverable, with cost, by proper suit in the Mayor's court, or before any justice having jurisdiction of the same; and in all actions or prosecutions for fines or penalties, not more than $50, the process may be, by warrant, returnable forthwith, and there shall be no stay of execution after judgment, saving the right of appeal immediately, and a trial by jury in the Mayor's court, or before a justice of the peace; * * and if any person shall be unable to pay any fine or penalty, less than $50, imposed on them under any ordinance or by-law of said city, they may be committed to the work-house until the same shall have been paid.

Sec. 39. The validity of city ordinances may be tried by a writ of prohibition from Warren Circuit Court, with the right of appeal, or writ of error to the High Court of Errors and Appeals.

15 Feby., 1839;

Laws of Miss., 1839, p, 304.

Supreme Court of the U. S.

NO. 148.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Plaintiff in Error*,

vs.

JOHN W. TOBIN AND MARY TOBIN,

Defendants in Error.

W. B. PITTMAN

AND

A. B. PITTMAN,

for Deft. in Error.

R. O. POLKINHORN, Printer.

Supreme Court of the U. S.

NO. 148.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Plaintiff in Error*,

vs.

JOHN W. TOBIN AND MARY TOBIN,

Defendants in Error.

Argument of Pittman & Pittman, for Defendants in Error.

This suit was instituted to recover five thousand four hundred dollars of taxes paid by the defendants in error for the landing of their vessels at the harbor of the city of Vicksburg, enacted from them under an ordinance which they allege, and which the Circuit Court adjudged, to be unconstitutional and inoperative.

The decision of the assignment of error in this case involves two question: the constitutionality of the ordinance, and the defence leased on the assumption that the payments were voluntary. We will discuss them in the order mentioned.

Unconstitutionality of Ordinance.

We cannot do greater service to this court in elucidating these questions than to set out in full the very able opinion of the learned circuit judge, who tried the case below—the Hon. Robert A. Hill.

We, therefore, quote his opinion here.

Opinion of R. A. Hill, Judge.

"This is an action in assumpsit, brought to recover the sum of $5,400, which, plaintiffs allege, was demanded of, and exacted from, them by the defendants, under a void ordinance, imposing a tax against owners of steamboats landing at the city of Vicksburg, on the Mississippi River."

The question to be determined arises upon special findings of the jury, which may be briefly stated as follows:

1. The plaintiffs owned a line of steamboats which have been engaged in the navigation of the Mississippi River, between the cities of Memphis, in the State of Tennessee, and New Orleans, in the State of Louisiana, and intermediate ports, of which the city of Vicksburg, in the State of Mississippi, is the most important.

2. The defendant, the city of Vicksburg, owned a part of the bank of the Mississippi River within its corporate limits, about three hundred feet along the bank known as the city wharf. This tract of land extends about two hundred and fifty feet back from the river at low-water mark, but is entirely submerged when the river is highest. This landing has been graded and protected from caving by the city at a very considerable expense. When this place is dry it is used as a place of deposit for cotton and other freights awaiting shipment.

3. During the time when these sums were exacted, the city rented to a corporation, called the "Citizen's Wharfboat Association," a portion of this wharf for the purpose

of keeping a wharf-boat. Plaintiffs' steamers, in landing at Vicksburg, with the exception of a very few times, landed at and made fast to this wharf-boat, from which they also received and upon which they discharged their freights, paying the Wharf-boat Association its charges therefor. From such charges the Wharf-boat Association derived a net annual income of about $10,000. It paid the city a liberal rent for the use of the wharf—part of the time $300 per month, part of the time $150 per month, and part of the time $1,000 per annum.

4. The ordinance under which the tax was demanded and collected was passed July 12, 1865, and is, in words and figures, as follows:

"AN ORDINANCE

"Establishing the rates of wharfage to be collected from steamboats and other water crafts landing or lying at the city of Vicksburg.

"SECTION 1. *Be it ordained by the Mayor and Common Council of the City of Vicksburg*, That all steamboats landing at this city shall pay wharfage according to the following rates: All packets terminating their trips at this city, per week, $10. All steamboats passing and repassing, for each landing as follows: All steamers under 1,000 tons, $10.00; each steamer exceeding 1,000 tons at the rate of $1 per every hundred tons excess; circus or exhibition boats, per day, $5.

"SEC. 2. *Be it further ordained*, That if the captain or officer in command of any boat or water craft shall refuse to comply with the provisions of this ordinance, on conviction thereof before the Mayor of said city, the captain or officer in command of such steamboat or water craft shall be liable for and pay the sum of $50, with costs of suit, and

said boat shall be charged at the rate of $100 for each landing thereafter until the settlement of the litigated claim.

* * * * * * *

"THOMAS J. RANDOLPH,
"*Mayor.*

"*Vicksburg, Miss., July 12th, 1865.*"

5. An officer appointed by the Mayor and Aldermen called the wharfmaster, upon each arrival of the plaintiff's steamers, presented to the officer in command, a blank receipt for the wharfage tax, upon the back of which was printed in red ink, the ordinance aforesaid, and demanded payment of $10 as wharfage tax, which was always paid.

6. Of the amount paid by plaintiffs during the six years preceding the institution of this suit, aggregating $5,400, a part amounting to $100 was paid for the landing of plaintiff's steamers, while they were plying between New Orleans and Vicksburg, the balance $5,300 having been paid while they were running between New Orleans and Memphis, landing at Vicksburg as an intermediate port. Plaintiffs have made no proof of any written or verbal protest, or objection on their part against the payment of this tax.

Upon the part of the plaintiffs it is contended that the ordinance referred to contravenes the provisions of the Constitution of the United States in several particulars, and is, therefore void, and conferred no authority for the collection of the tax: that the payments were made by them under compulsion to avoid the penalties denounced by the ordinance for non-payment.

Upon the part of the defendants it is insisted: 1st. That the ordinance is valid; 2d. That the payments were not made under the ordinance, but, merely, as a reasonable compensation for the use of the wharf; and 3d. That all the payments were voluntarily made, with full knowledge

of the law and the facts, and, hence, plaintiffs have no right to recover them.

"That this ordinance is repugnant to the Constitution of the United States, in several particulars, I do not entertain any doubt. By the Constitution, Congress alone is invested with the right to regulate commerce among the States, and the latter are prohibited from imposing any duty of tonnage without the consent of Congress. The Mississippi River is one of the great highways of commerce in the United States. That the plaintiffs' vessels, for the landing of which this wharfage tax was imposed and collected, were largely engaged in the transportation of articles between the States bordering upon this great river, is not questioned."

The right of plaintiffs to navigate the river with their vessels, included the right to land at its banks, as required by the necessities of the business in which they were engaged. The public interest is concerned in the protection of commerce, vouchsafed by the Constitution of the United States, and the law of any State or municipality interfering with, or obstructing it in any manner prohibited, should be unhesitatingly denounced as null and void by the Courts.

The ordinance, by its terms, imposes this tax for the privilege of "landing at the city of Vicksburg," and not for the use of the city's wharves. It applies as well to a landing at the wharf-boat or upon the private property of any citizen. The tax is imposed for the privilege of stopping at the city of Vicksburg. To acknowledge the validity of such an ordinance, would be to make the immense commerce which floats the Mississippi river the easy prey of all the towns and cities upon its banks. This commerce, carried on by these agencies, constitutes the very life-blood of Vicksburg, and other towns and cities on the banks of this

river. Public policy requires that this commerce shall be aided and facilitated, not taxed and obstructed. But the unconstitutionality of this ordinance is not maintained by reason alone, but by the supreme judicial authority also. Every decision made by the Supreme Court of the United States touching the subject, from its organization to the present time, condemns every such law or ordinance.

Cannon vs. *New Orleans*, 20 Wallace, 577.

"That this demand was made and enforced in pursuance to the ordinance, is apparent, from the fact that no other law, or ordinance, or city regulation authorized or required it. Defendant has not exhibited, or pretended to have had any other law or authority. It is, moreover, evident from the fact that the collections were made by the officer designated and appointed for the collection of that tax, and from the fact that the receipts given by him for the payment of the tax, had printed upon them a copy of the ordinance; and, to make it more conspicuous, it was printed with red ink. This must have been done that those to whom they were presented might see the penalties denounced for the non-compliance, and, to avoid which, it was well expected payment would be made without resistance. I must hold, therefore, that this defence is not maintainable."

It will be seen that the learned counsel for plaintiffs in error is wrong in his supposition that the judgment in this case was based on a misapprehension of a decision of *Cannon* vs. *New Orleans*. The questions are elaborately argued *de novo*, and treated as original questions by the learned judge. Neither can it be said that there is any distinction between this case and that of *Cannon* vs. *New Orleans*, except such as is favorable to the right of recovery.

In the brief filed for plaintiffs in error, it is noted that the ordinance declares that "all steamboats landing at *this city* shall pay wharfage at the following rates;" and then

the argument proceeds:—"But the dues collected were only for landing on that portion of the river front, 1,800 feet, which the city had purchased and which at large cost it kept in repair." Thus the whole question of the constitutionality of an ordinance is sought to be disposed of by suggesting the manner in which it was enforced. The argument then proceeds to show that a municipality may lawfully charge wharfage, a compensation for services performed or facilities furnished. The question is not what the city *might have done*, but what it *has done*. The finding of the jury is that these exactions were made under and by virtue of the ordinance set out in the transcript, which both in its caption and body exacts the tax for *landing at this city*. Unlike the Keokuk Ordinance in which the tax is imposed in more than one section, there is no authority, no word or syllable imposing any tax in the Vicksburg Ordinance, except the words with which the ordinance begins, viz: "Sec. 1. That all steamboats *landing at this city* shall pay wharfage at the following rates."

In the Keokuk case there were two sections, and the Court obtained the conclusions that the prohibited parts were severable, one section declaring the liability to pay the tax for landing at the wharf, and the other section declaring the tax against boats to which might land "at any part of Water Street" and "that the persons owning, claiming and having charge of the same should be subject to the rules, regulations, wharfage and penalties as were provided by the ordinance in relation to boats, &c., landing at the wharf, as defined by the third section." The quotation is from the report of the Koekuk Case, 95 U. S., 81. The distinction which we have thus pointed out is the only one which we can find between that case and the one of *Cannon* vs. *New Orleans*. So far as we can see, the opinion rendered in the Packet Co. and Keokuk might have been given with equal propriety in the New Orleans case, and *vice*

versa, unless there is the distinction which we have designated. The New Orleans Ordinance was denounced as void, *not* because the steamer of Cannon had in fact landed away from the wharf and been made to pay for landing on the unimproved banks, but because *the language of the ordinance covers landing anywhere within the city limits*." "The tax is therefore collectible for vessels which land at any point on the banks of the river, without regard to the existence of the wharves." A tax which is, by its terms, due from all vessels arriving and stopping in a port without regard to the place where they may stop, whether it be in the channel of the stream or out in a bay, or landed at a natural river bank, *cannot be treated as a compensation for the use of a wharf*.

These quotations are from the opinion of this court in the case of *Cannon* vs. *New Orleans*, and the language quoted contains the *gist* of that case. The decision was made by a unanimous court, and the case has been repeatedly cited and approved by this court since.

If the case of *Packet Co.* vs. *Keokuk* is in conflict with our case, then it is in conflict with the Cannon case; yet no such idea is suggested in the opinion. The case of Cannon, on the contrary, is quoted in the Keokuk case without one word of disapprobation. Inasmuch as this court did not question the correctness of its judgment, we may assume that it adhers to it. If the Vicksburg Ordinance is "*severable*" by enforcing it in one way rather than in another, then the New Orleans Ordinance was severable in the same way. But this court has said, as above quoted: "A tax which is, *by its terms*, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, * * * cannot be treated as a compensation for the use of a wharf."

If that is true now, as it was then, the Vicksburg ordinance can not be so treated.

It is difficult, if not impossible, to conceive any escape from the logic of the last quotation. Certainly it can not be avoided by talking about a severance of the constitutional and unconstitutional parts; because there is but *one* part, *one* subject-matter, *one* purpose in the ordinance so far as the question of constitutionality is concerned.

The tax is declared, not only in *one* section, but in *one* clause of one sentence. It is created *una flatu*. The one subject-matter is tax against boats for landing at Vicksburg, and every part of the ordinance is designed to effect that purpose. No one could learn from the ordinance that the City of Vicksburg had a wharf of any kind; and yet we are told that its object was to collect a tax for the use of a wharf: and because these boats landed against a wharf-boat, which itself paid a tax, that defendants in error can not complain that they were forced to pay under an illegal law.

The constitution of Mississippi provides that "no preference shall ever be given by law to any religious sect, or mode of worship, but the free enjoyment of all religious sentiments and the different modes of worship shall ever be held sacred."

A statute of Mississippi, imposing a license tax on every person preaching the tenets of the Baptists or Presbyterians, would be unconstitutional.

But suppose one who had been made to pay a tax under such a statute, suing to recover the illegal exaction, should happen to be a lawyer or an auctioneer, could the defence be made that he might well have been required to pay a tax as a lawyer or as an auctioneer, and as to *him* the tax was not illegal, as he had paid merely a reasonable license tax for the business in which he was engaged? It seems to us that such a defence, in such a case, would not differ in principle from the claim that this is a compensation for the use of a wharf.

The payment was not voluntary.

The learned counsel for plaintiffs in error cites numerous decisions to show that the payments made by Tobin are to be regarded as voluntary. We will, in reply, extract from the opinion of the learned judge who tried this case, as giving a clear statement of the law on that point.

Extract from opinion of R. A. Hill, Judge.

"The remaining defence relied on is, that the payments were voluntarily made. * * *

The provisions of the ordinance under consideration, together with the relation the parties bear to it, place them on very unequal grounds. In the first place the ordinance is very highly penal against all parties who do not yield an unquestioning obedience to its requirements. To instance, it imposes a fine of fifty dollars against the captain or officer in command of any steamboat who shall refuse to comply. The city's own officer is to be the judge who tries the offender, for the ordinance provides, 'on conviction thereof before the Mayor of said City, the officer shall pay, &c.' There is also a provision intended to place the owners of the boat at a disadvantage. It provides, 'and the said boat shall be charged at the rate of $100 for each landing thereafter until the settlement of the litigated claim. The Mayor is authorized to enforce fines by imprisonment."

In *Tuttle* vs. *Everett*, 51 *Miss.*, 27, it was held that, when a corporation levies an illegal tax, and the tax payer pays it to one who has a formal authority to collect it, such payment is not voluntary but compulsory, and may be collected from the tax collector unless he has paid it over to his superiors, in which event, suit must be brought against the corporation." This was a tax collected under an act afterwards declared void.

In the case of *City of Marshall* vs. *Snedaker*, 25 Tex., 460, it is held that payment under an ordinance imposing heavy penalties for non-payment is not voluntary, because the parties do not stand on an equal footing.

County of LaSalle vs. *Wm. Simmons*, 5 Gilman, 513 (Ill.)

See cases and argument found on p
brief and argument of Mr. James H. D
of *North Western Union Packet Co.* vs.

The case of *Tuttle* vs. *Everett*, cited ab
in Mississippi to be that when one pays
officer of a Municipal Corporation, formally authorized to receive it, the payment is not voluntary, and the money so paid may be recovered back without proof of protest or objection made at the time of payment. The Supreme Court of Mississippi, in the recent case of *Butler* vs. *The City of Vicksburg*, (not yet reported) upon full argument, confirmed the doctrine of *Tuttle* vs. *Everett* fully, and gave their reasons therefore, in an able and well argued opinion, delivered by the late Chief Justice Simrall.

In *Tuttle* vs. *Everett*, it is said: "The R. R. Co. is not entitled to the money, neither is the tax collector; it must therefore belong to him from whom it was illegally exacted."

In the case of *Lamborn* vs. *County Commissioners*, 97 S. C. Reports, quoted in brief of plaintiff in error, the Court uses this language with reference to question of whether the payment in that case was voluntary, after citing a decision of the Supreme Court of that State: "And as it is the law of Kansas, which we are called on to administer the settled decisions of its Supreme Court are entitled to the highest respect."

In the case at Bar it is the law of Mississippi that the

The payment was not voluntary.

The learned counsel for plaintiffs in error cites numerous decisions to show that the payments made by Tobin are to be regarded as voluntary. We will, in reply, extract from the opinion of the learned judge who tried this case, as giving a clear statement of the law on that point.

Extract from opinion of R. A. Hill, Judge.

"The remaining defence relied on is, that the payments were voluntarily made. * * *

The provisions of the ordinance under consideration, together with the relation the parties bear to it, place them on very unequal grounds. In the first place the ordinance is very highly penal against all parties who do not yield an unquestioning obedience to its requirements. To instance, it imposes a fine of fifty dollars against the captain or officer in command of any steamboat who shall refuse to comply. The city's own officer is to be the judge who tries the offender, for the ordinance provides, 'on conviction thereof before the Mayor of said City, the officer shall pay, &c.' There is also a provision intended to place the owners of the boat at a disadvantage. It provides, 'and the said boat shall be charged at the rate of $100 for each landing thereafter until the settlement of the litigated claim. The Mayor is authorized to enforce fines by imprisonment."

In *Tuttle* vs. *Everett*, 51 *Miss.*, 27, it was held that, when a corporation levies an illegal tax, and the tax payer pays it to one who has a formal authority to collect it, such payment is not voluntary but compulsory, and may be collected from the tax collector unless he has paid it over to his superiors, in which event, suit must be brought against the corporation." This was a tax collected under an act afterwards declared void.

In the case of *City of Marshall* vs. *Snedaker*, 25 Tex., 460, it is held that payment under an ordinance imposing heavy penalties for non-payment is not voluntary, because the parties do not stand on an equal footing.

County of LaSalle vs. *Wm. Simmons*, 5 Gilman, 513 (Ill.)

See cases and argument found on page 29 of the able brief and argument of Mr. James H. Davidson, in the case of *North Western Union Packet Co.* vs. *City of St. Louis.* Case 110,

The case of *Tuttle* vs. *Everett*, cited above, settles the law in Mississippi to be that when one pays an illegal tax to an officer of a Municipal Corporation, formally authorized to receive it, the payment is not voluntary, and the money so paid may be recovered back without proof of protest or objection made at the time of payment. The Supreme Court of Mississippi, in the recent case of *Butler* vs. *The City of Vicksburg*, (not yet reported) upon full argument, confirmed the doctrine of *Tuttle* vs. *Everett* fully, and gave their reasons therefore, in an able and well argued opinion, delivered by the late Chief Justice Simrall.

In *Tuttle* vs. *Everett*, it is said: "The R. R. Co. is not entitled to the money, neither is the tax collector; it must therefore belong to him from whom it was illegally exacted."

In the case of *Lamborn* vs. *County Commissioners*, 97 S. C. Reports, quoted in brief of plaintiff in error, the Court uses this language with reference to question of whether the payment in that case was voluntary, after citing a decision of the Supreme Court of that State: "And as it is the law of Kansas, which we are called on to administer the settled decisions of its Supreme Court are entitled to the highest respect."

In the case at Bar it is the law of Mississippi that the

Court is called on to administer, and the settled decisions of the Supreme Court of that State are entitled to the highest respect. We feel that we might well rest the case as far as the question of voluntary payments is concerned upon the decisions of the Supreme Court of Mississippi, which we have cited, as being conclusive in this case. Counsel for plaintiff in error dwells upon the absence of any protest in this case as conclusive that the payments were voluntary. The only office performed by the protest is to give the officer or agent notice in order that he may not pay it over to his principal.

It is required, where suit is against the officer, for it would be unjust, to pay him money without objection and afterwards to recover judgment against him, when the money had been paid over by him to the corporation or government for whom he collected the same.

A protest cannot make a voluntary payment an involuntary one. In the case of *Lamborn* vs. *Commissioner*, this court, cites, approvingly, the case of *Wabrevskie Co.* vs. *Walker*, 8 Kansas, in which the court says: "And the fact that the party, at the time of making the payment, files a written protest, does not make the payment voluntary." Mr. Davidson, counsel for the *Northwestern Union Packet Company* vs. *City of St. Louis*, to whose brief we have referred before, seems to have fallen into the error of thinking a protest necessary, or, at least, that its presence would add strength to his case. He cites 12 Wallace, 209, State Tonnage cases, to show that, if the tax is illegal, and *paid under protest*, the party praying may recover it back.

The Tonnage cases were suits brought against the collector, and, therefore, a protest, or notice, was necessary to hold him on the principle we have before stated. In this case, we are not sueing the officer, but the corporation, who received and holds the money. We can conceive of cases in which a protest would furnish most conclusive proof that

the payment was voluntary, for it would demonstrate that the party making the payment, did not do so under a mistake of the facts. Except on the question of protest, we adopt the arguments advanced by Mr. Davidson in his brief, under the subject of voluntary payments, and ask the court to consider them as part of this argument.

In conclusion, we challenge counsel for plaintiff in error to show any distinction in the facts of this case, that would prevent it from being decided by the principles laid down in the case of *Cannon* vs. *City of New Orleans*. Wherever the facts of the two cases differ, the difference is in favor of the present case. New Orleans had an improved and expensive wharf. Vicksburg had none. Cannon landed his boat at the foot of Canal Street, where the city had constructed an expensive wharf. See pages 82, 83, 84, of Transcript of Record of case of *Cannon* vs. *New Orleans*, decided at October Term of this Court, A. D. 1874. The plaintiff in this case landed his boats against a wharf boat and delivered his freight on this wharf boat, except about twenty times, when he landed at a bank called a wharf. which was impassable from mud in wet weather, and totally submerged during the high water seasons, which, on the Mississippi River is about three months in the year.

If the fact that Cannon's boat, for sixteen years, had landed at, and used the improved wharves of, New Orleans, did not make the ordinance under which wharfage had been collected constitutional and valid, and did not prevent his recovering these exactions from New Orleans, then certainly the fact that Tobin's boats, in this case, made fast to wharf boat, which was itself paying the city of Vicksburg a large sum for the privilege of lying against its landing, cannot make the ordinance of Vicksburg constitutional, or be any reason why Tobin shall not recover back the illegal tax paid by him under said ordinance.

We note that counsel for plaintiff in error, upon page 7 of his brief, makes the point that the special verdict of the jury does not find, that Tobin's boats were regularly licensed and enrolled as American vessels, employed in the navigation of the Mississippi River. The averment was an immaterial one; but the verdict does find that the boats were engaged in the coasting trade on the Mississippi River, between New Orleans and Vicksburg and other ports above Vicksburg. The law requires all boats engaged in the coasting trade to be American vessels, regularly enrolled, &c. So the verdict does, in effect, find that they were enrolled, &c., but we do not suppose that counsel intended to insist seriously on the point, as he has offered no argument on it.

W. B. PITTMAN,
A. B. PITTMAN,
for Def'ts in Error.

Courtyard Egypt 1866.

1 Sinai Mountains 47.